

Volume 2

Pages 212 - 490

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

FEDERAL TRADE COMMISSION,

Plaintiff,

VS.

MICROSOFT CORPORATION, et al.

Defendants .

NO. C 23-02880 JSC
SEALED PAGES 216-225, 228-266
and 369-389

San Francisco, California

Friday, June 23, 2023

TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS

APPEARANCES :

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ETHAN GURWITZ, ATTORNEY AT LAW

REPORTED BY: Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter

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(The following pages 216 through 225 were placed under seal by Order of the Court:)

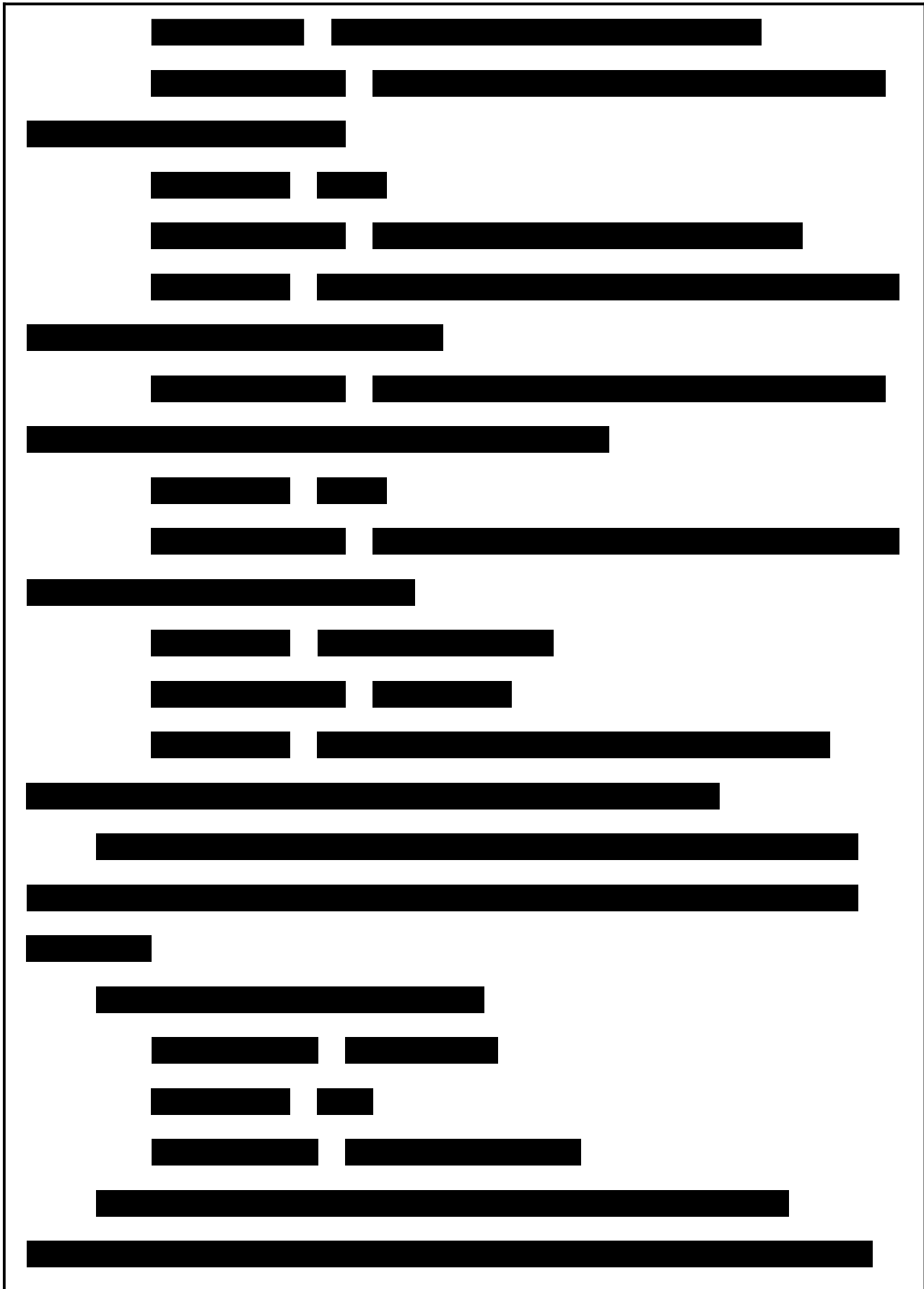
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(Proceedings resumed at 8:33 a.m.)

(The following proceedings were heard in open court:)

THE CLERK: Remain seated. Come to order.

THE COURT: Okay. Good morning.

All right. So I understand that the FTC's next witness is Ms. Lawver?

MR. WEINGARTEN: Yes, Your Honor. The FTC will call Ms. Lawver. My colleague Ethan Gurwitz will be examining.

THE COURT: And Ms. Lawver is the CFO?

1 **MR. WEINGARTEN:** No, Your Honor. She's not the CFO,
2 but she's a senior finance officer.

3 **THE COURT:** A senior finance person.

4 So I've gone over with the parties and given the nature of
5 her testimony, it's all confidential financial information,
6 internal business information. So, unfortunately, for this
7 portion of the trial, we need to seal the courtroom.

8 I know you-all just came in and now I'm kicking you out,
9 but I wanted to explain what we're doing.

10 We went through, and although we're trying very hard to
11 keep the proceedings open, there's just no way to do it with
12 this particular testimony because it's all financial
13 information.

14 So we're going to close the courtroom. We anticipate it
15 will be about 45 minutes total.

16 There is a cafeteria on the second floor if, in any event,
17 you would like to go there or you're welcome to hang out in the
18 hallway. Just try not to be too noisy. We can sometimes --
19 we'll go as quickly as we can. And I apologize. There's just
20 no way to conduct this particular witness in open court.

21 I do know that the Plaintiff's Counsel from DeMartini is
22 here, and so I need to ask Microsoft, given that they would get
23 access to this testimony in any event, if you have any
24 objection to them being present.

25 **MS. WILKINSON:** Your Honor, I know they're under the

1 protective order we're under in DeMartini. I don't know if
2 it's exactly the same here so I'm a little uncomfortable.

3 **THE COURT:** Is it just you, Mr. Zirpoli, today?

4 **MR. ZIRPOLI:** May I approach, Your Honor?

5 **THE COURT:** Yes, you may.

6 I think it's only Mr. Zirpoli today.

7 **MS. WILKINSON:** Well, he's a very nice guy and I'm
8 sure he will --

9 **MR. ZIRPOLI:** Thank you.

10 **MS. WILKINSON:** -- follow the rules. I mean, we can
11 always give him the transcript afterwards.

12 **THE COURT:** No, I'm just saying -- I'm sure you would
13 have to do that in any event. So since he's here, I'm
14 wondering whether just to allow him.

15 **MS. WILKINSON:** Promise to follow the rules?

16 **MR. ZIRPOLI:** I promise, Your Honor.

17 **THE COURT:** All right. You may stay then.

18 **MR. ZIRPOLI:** Thank you.

19 **THE COURT:** All right. Everyone else, though, I'm
20 sorry, because you are not counsel in the other case, you do
21 need to leave unless you're a Microsoft person.

22 And, Microsoft, I'm going to leave it to you and
23 Activision to tell me if the people who are staying are with
24 you.

25 (Pause in proceedings.)

(The following pages 228 through 266 were placed under
seal by Order of the Court:)

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8	Canada	35%
9	Sweden	55%
10	Australia	60%
11	South Korea	50%
12	India	35%
13	China	30%
14	Brazil	65%
15	Russia	20%
16	Mexico	15%
17	Argentina	55%
18	South Africa	35%
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(Pause in proceedings.)

(The following proceedings were heard in open court:)

THE COURT: All right. We're now ready to proceed
again in open court.

Is FTC prepared to call your next witness?

MR. WEINGARTEN: Thank you, Your Honor.

The FTC calls Mr. Phil Spencer.

\\

SPENCER - DIRECT / WEINGARTEN

PHIL SPENCER,

called as a witness for the Plaintiff, having been duly sworn,
testified as follows:

THE CLERK: Can you please state your name for the
record?

THE WITNESS: Phil Spencer.

THE CLERK: Thank you.

THE COURT: Good morning.

THE WITNESS: Good morning. How are you?

THE COURT: You may proceed.

MR. WEINGARTEN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WEINGARTEN:

Q. Good morning, Mr. Spencer.

A. Good morning.

Q. You are the CEO of Microsoft Gaming; correct?

A. Yes.

Q. And you are the final decision maker at Microsoft Gaming;
right?

A. Yes.

Q. And you report directly to the CEO of all of Microsoft
Corporation, Mr. Satya Nadella?

A. I do.

Q. And I'll note you're attending this hearing as the
corporate representative for Microsoft in this matter; right?

1 A. I don't actually know what my official title is sitting at
2 the table.

3 Q. You've sat at the counsel table and you've heard all the
4 testimony so far; right?

5 A. And I'll be here next week.

6 Q. Okay. So you heard the testimony that you are the decider
7 about what is exclusive in terms of video games for Microsoft
8 Gaming; right?

9 A. Yes.

10 Q. And that's true; right?

11 A. Yes.

12 Q. Okay. You have been the leader of the strategy at
13 Microsoft to acquire more content over the last six years or
14 so?

15 A. I've been the leader of Microsoft Gaming for nine years.

16 Q. And you've been the leader of the strategy to acquire more
17 content; right?

18 A. Yeah.

19 Q. Okay. And when you took over as the head of Gaming,
20 Microsoft maybe had approximately ten studios?

21 A. I don't actually remember the number.

22 Q. Okay. Do you remember how many studios there are now?

23 A. I think the number we use for PR is 20 -- over 23 studios.

24 Q. Okay. Do you think it would refresh your recollection
25 about the number of studios when you took over if I showed you

1 your investigational hearing transcript?

2 A. I'm not disputing ten. I just don't remember exactly.

3 Q. No, that's okay.

4 A. Yeah.

5 Q. Do you think it would help you remember if I showed you
6 where you talked about it under oath?

7 A. We can say it's ten.

8 Q. Well, I just want to make sure, sir, that you say it's
9 ten.

10 A. I can say it's ten.

11 Q. Thank you.

12 Now, the Xbox ecosystem refers to Xbox as a place where
13 Xbox customers invest their time and money; right?

14 A. We talk about the Xbox ecosystem as the platform where
15 creators build games for players to play and the place that
16 players come to play video games.

17 Q. The Xbox ecosystem includes Xbox console?

18 A. Yes.

19 Q. The Xbox ecosystem includes Game Pass?

20 A. Game Pass is part of it, yes.

21 Q. Xbox ecosystem includes xCloud?

22 A. Yes.

23 Q. And the Xbox ecosystem includes Xbox products that are
24 available on PC; right?

25 A. And our Xbox PC app and the players that we have on PC

SPENCER - DIRECT / WEINGARTEN

1 that play Game Pass games or subscribe to Game Pass on Windows
2 PCs.

3 **Q.** Okay. The standard --

4 **MR. WEINGARTEN:** Standard revenue split for consoles,
5 I don't think there's any issue with the standard split.

6 **MS. WILKINSON:** That's right. I think that's what
7 they call it.

8 **BY MR. WEINGARTEN:**

9 **Q.** Yeah. The customary split is 70 percent to the content
10 creator, 30 percent to a platform like Microsoft; right?

11 **A.** That's correct.

12 **Q.** Okay.

13 **MR. WEINGARTEN:** On the PC, the standard or customary
14 split, any issue with that?

15 **MS. WILKINSON:** Well --

16 **MR. WEINGARTEN:** One second, Your Honor.

17 **THE COURT:** Of course.

18 (Pause in proceedings.)

19 **BY MR. WEINGARTEN:**

20 **Q.** Could you please turn, sir, in your invest- -- if you look
21 in your binder, you should have a binder that's labeled
22 depositions or testimony.

23 **A.** The witness binder; is that --

24 **MR. WEINGARTEN:** May I approach the witness,
25 Your Honor?

1 **THE COURT:** You may.

2 (Pause in proceedings.)

3 **THE WITNESS:** Thank you.

4 **BY MR. WEINGARTEN:**

5 **Q.** If you could please turn to the tab that's your
6 investigational hearing transcript. It's 7011.

7 **A.** Yep.

8 **Q.** And if you could look at page 87, please, of that.

9 **A.** Yeah.

10 **Q.** Actually page 88.

11 **A.** 88?

12 **Q.** Don't read it out loud. Little page 88 in the upper
13 corner. Do you see the little four corners? There's like four
14 pages per page?

15 **A.** Oh, sorry. I was looking at the --

16 **Q.** So in the little corners page 88.

17 **A.** Sorry about that.

18 **Q.** That's okay. It's -- I don't want to confuse you further,
19 but it's page 023 of the big numbers at the bottom.

20 So page 88, and I wanted you to look at the testimony that
21 starts on line 5. And do you see those numbers there, the
22 percent that goes to partner, percent that stays with
23 Microsoft?

24 **A.** Yes.

25 **Q.** Is that Microsoft's customary revenue split for PC games,

1 those two numbers?

2 **A.** Yes.

3 **Q.** Okay. Thank you.

4 And for Game Pass, the customary split, is the console
5 customary split the same 70/30?

6 **A.** Game Pass is a subscription so there isn't a revenue split
7 per se. We -- we sign content to come into the subscription,
8 and it's some combination of an upfront fee that we will pay
9 creators to put the game in or an ongoing usually based on
10 usage of the game in the subscription. So it doesn't really
11 fit the store model that you're talking about.

12 **Q.** There is a customary split for Game Pass, for example, for
13 post-sale monetization, all the money that gets made in the
14 game after the initial sale; right?

15 **A.** Any player who's playing a game on our platform, whether
16 it's a free-to-play game or a game that they acquired through
17 the subscription or a game that they paid to own, has the same
18 royalty split we talked about previously.

19 **Q.** Okay. That's the 70/30 split?

20 **A.** Yes.

21 **Q.** Okay. Thank you.

22 Now I want to talk to you a little bit about the console
23 market, sir, and in particular Generation 9.

24 Now, a game built to showcase Generation 9 hardware can
25 showcase Generation 9 hardware on a PlayStation 5; right?

1 A. Yes.

2 Q. And a game built to showcase Generation 9 hardware can
3 showcase Generation 9 hardware on an Xbox X; right?

4 A. Xbox Series X, yes.

5 Q. Okay. And it can do that on an Xbox Series S as well;
6 right?

7 A. S is a lower specced machine than Series X. Its price is
8 lower so the features are not the same as they are with
9 Series -- the Xbox Series X. So there is a functional
10 difference between games running on Series X and running on the
11 lower priced Series S.

12 Q. You refer to X and S together as the Xbox series consoles;
13 right?

14 A. Yes.

15 Q. Okay. And I want you to turn in PX7011, that's your IH
16 transcript, and I want to you look at little number 345.

17 A. Little number 345?

18 Q. Yeah, page 345 of the transcript, please.

19 A. (Witness examines document.) Yeah.

20 Q. If you look at line 17, the question was (as read):

21 "Putting aside cross gen, game built for Gen 9
22 hardware can showcase Gen 9 hardware on either a
23 PlayStation 5 or an Xbox series; right?"

24 And your answer was: "Yes."

25 A. Yeah. I'm making the distinction that the two consoles

1 are not functionally equivalent.

2 **Q.** You're making that distinction now, but my question is
3 about your testimony then. That was your testimony then;
4 right?

5 **THE CLERK:** Mr. Weingarten, I'm sorry. Would you
6 please slow down for the reporter?

7 **MR. WEINGARTEN:** Yes, ma'am.

8 **BY MR. WEINGARTEN:**

9 **Q.** I'm asking -- I don't mean to interrupt you, sir, but I'm
10 trying to ask you about that testimony.

11 That was truthful and accurate when you gave it; right?

12 **A.** My answer here was "Yes."

13 **Q.** Thank you.

14 Now, you don't know whether a game built for Generation 9
15 hardware can or cannot showcase Generation 9 hardware
16 capabilities on a Switch; right?

17 **A.** Switch is differently designed device, yes.

18 **Q.** Okay. And in terms of processing power of GPU, the
19 graphics processor, and the CPU Switch is more akin to a
20 Generation 8 than a Generation 9; right?

21 **A.** No, I wouldn't agree with that. The Switch was designed
22 for people to take on the go. I mean, an obvious difference
23 when you look at all of them is the Switch has a screen. It
24 has a battery. It's a mobile platform. People can take it
25 with them. Whereas, the Gen 8 consoles require that they're

1 plugged into the wall and don't have a screen. It's --
2 Nintendo built a different platform.

3 Q. Okay. I just want -- on that question I asked you, sir,
4 please look at little page 168 in your sworn testimony.

5 A. Little page 168?

6 Q. Little page 168, transcript page 168, line 21. Let me
7 know when you're there.

8 A. (Witness examines document.) I'm there.

9 Q. (as read):

10 "QUESTION: Well, let me ask you two questions then. In
11 terms of processing power, meaning CPU and GPU, is the
12 Switch more akin to a Gen 8 device or a Gen 9 device?"

13 Your answer (as read):

14 "In terms of CPU and GPU, it would be more akin to a
15 Gen 8 device."

16 That was your testimony?

17 A. That was.

18 Q. And it was truthful and accurate when you gave it?

19 A. That was, yes.

20 Q. Okay. Now, the Nintendo Switch cannot support the highest
21 level of resolution that the Xbox Series X can support; right?

22 A. That's correct.

23 Q. The maximum advertised Xbox X resolution is 4K HD; right?

24 A. That's correct.

25 Q. And even the Series S can upscale and also support 4K HD;

1 right?

2 A. It can upscale to 4K.

3 Q. Now, you don't know what the maximum resolution is for a
4 Switch; right?

5 A. Not sitting here today, no.

6 Q. Okay. And there's also a metric for gaming consoles
7 that's called frames per second or FPS; right?

8 A. Yes.

9 Q. And that also has to do with what the game looks like when
10 you play it?

11 A. I would say it's more what the game feels like when you
12 play it.

13 Q. Okay. Xbox X and S can both support 120 frames per
14 second; right?

15 A. If the developer designs for that, yes.

16 Q. And you don't know the maximum frames per second that a
17 Switch can support; right?

18 A. I do not know.

19 Q. Now let's talk about the PlayStation 5.

20 You do know that the PlayStation 5, like the X and the S,
21 can support 4K HD?

22 A. I do.

23 Q. And you do know that the PlayStation 5, like the X and the
24 S, can support 120 frames per second?

25 A. I believe that's true.

1 Q. Okay. Now, there's also a metric for measuring processor
2 performance called floating point operations per second or
3 FLOPS; correct?

4 A. That's correct.

5 Q. You don't know the maximum advertised FLOPS for a Switch;
6 right?

7 A. I do not.

8 Q. Okay. But it's fair to say even if you don't know exactly
9 the Switch FLOP metric, the Xbox X operates at a higher FLOPS
10 than a Switch; right?

11 A. That's fair to say.

12 Q. And it's your understanding that Xbox S also operates at a
13 higher FLOPS rate than Switch; right?

14 A. Yes, I believe that's true.

15 Q. Okay. Now, you're familiar, these consoles to play them,
16 you often need a type of a controller; right?

17 A. You -- yeah.

18 Q. Okay. And a haptic controller is a type of controller
19 that when you do something in the game, you actually feel it
20 through the controller; right?

21 A. Yeah.

22 Q. Okay. Xbox X can work with a haptic controller; right?

23 A. Yes.

24 Q. And Xbox S can work with a haptic controller; right?

25 A. Yes.

1 Q. And the PlayStation 5 can work with a haptic controller;
2 right?

3 A. It can, yes.

4 Q. And you don't know if the Nintendo Switch has a haptic
5 controller; right?

6 A. I do not.

7 Q. Now, the Switch sells at a lower price than Xbox Series X;
8 right?

9 A. It's equivalently priced to the S and it's lower priced
10 than the X.

11 Q. Okay. And it sells at a lower price than the
12 PlayStation 5; right?

13 A. It sells at a lower price than the PlayStation 5.

14 Q. Now I want to take a look at some of the documents that
15 you and your team use when you're thinking about consoles.

16 So turn in your binder, the one that has the documents,
17 please, to PX1114.

18 A. (Witness examines document.)

19 Q. I know the print in the beginning is very tiny.

20 THE COURT: Illegible.

21 THE WITNESS: Yeah, thank you.

22 BY MR. WEINGARTEN:

23 Q. We will work on swapping something, but I don't have a
24 question about too much about that. I have a question that
25 starts on page 8 where the print is much better.

1 A. (Witness examines document.)

2 Q. Okay. This -- this document that starts on page 8 is an
3 example of a strategy document for Microsoft Gaming?

4 A. I don't seem to have the cover letter for the document.

5 Q. That's part of the legibility, but do you see the part
6 where it says "Ambition of the CSA"?

7 A. I see that. I just don't see the context of the bullet
8 point.

9 Q. Okay. And you've seen documents like this for Gaming
10 before; right?

11 A. I've seen documents, yeah.

12 Q. Okay. What does "CSA" mean at Microsoft?

13 A. Customer solution area.

14 Q. Okay. And that's like a division at other companies?

15 A. Roughly, yes.

16 Q. Okay. Gaming is a CSA at Microsoft?

17 A. Yes.

18 Q. Okay. Take a look, please, at page 013.

19 A. (Witness examines document.)

20 Q. Do you see that page, sir?

21 A. I do.

22 Q. And you see number 4, "Growth Horizon 1, fiscal year
23 2022"?

24 A. I do.

25 Q. And it says (as read):

1 "For fiscal year" --

2 No, I can't read that aloud. Well, take a look at that
3 and look at number 1. Do you see the heading for number 1
4 there?

5 A. I do.

6 Q. Okay. That was a -- a priority for the Gaming leadership
7 team for fiscal year 2022?

8 A. Yeah, it is or was.

9 Q. Okay. And if you look under it, do you see where it says
10 "Key metrics to evaluate success"?

11 A. I do.

12 Q. Okay. Don't read it out loud, but that second bullet, do
13 you see that one about share?

14 A. I do.

15 Q. Okay. That was the key metric to evaluate your success in
16 that priority we just discussed; correct?

17 A. There's more than one listed. So when you say it's the --

18 Q. I'm sorry. I'll rephrase.

19 Of the two metrics listed, the one in the second bullet is
20 one of those two metrics for your success in Gaming in that
21 priority that's shown in number 1 there; right?

22 A. It is the second bullet of the first bullet of three
23 different bullets about our overall priorities.

24 Q. Okay. But it's one of the key metrics for evaluating
25 success in that number 1 there; right?

1 **A.** Yes.

2 **Q.** Okay. Thank you.

3 You can put that one aside.

4 Oh, and there's -- well, thank you.

5 **MR. WEINGARTEN:** Your Honor, I know we have a
6 legibility concern, but can I move -- I'd like to move to admit
7 PX1114, and we'll work with the other side if we get a better
8 version of the cover.

9 **THE COURT:** All right. Admitted.

10 (Trial Exhibit 1114 received in evidence.)

11 **MR. WEINGARTEN:** Thank you, Your Honor.

12 **BY MR. WEINGARTEN:**

13 **Q.** Could you please turn in the binder, sir, to PX1888?

14 **A.** Okay.

15 **Q.** Take a look at page 002. Do you see the title?

16 **A.** I do.

17 **Q.** Do you see the date?

18 **A.** I do.

19 **Q.** Okay. You've seen these kind of business documents
20 before, correct, at Microsoft?

21 **A.** Yes.

22 **Q.** And this kind of document is presented to the board of
23 directors of Microsoft; correct?

24 **A.** Um, this kind of document's used in many places one of
25 which is with the board, yes.

1 Q. Okay. And if you look back at page 1 of the document --
2 of PX1888, look at the first sentence, please.

3 A. (Witness examines document.) Yes.

4 Q. Does that indicate to you that this document is being used
5 for a board meeting?

6 A. It does.

7 Q. Okay. Could you please turn to page 036?

8 A. (Witness examines document.) I'm there.

9 Q. Okay. Thank you, sir.

10 And that page is headed "Gaming Scorecard"; right?

11 A. It is.

12 Q. Okay. And that's a scorecard that gets presented to
13 Microsoft's board of directors; right?

14 A. It is.

15 Q. Okay. And there are four metrics in the scorecard for
16 Gaming in that top box; right?

17 A. There are.

18 Q. Okay. The metric in the fourth row, don't read it out
19 loud, but that is one of the metrics that was presented to the
20 board; correct?

21 A. It is.

22 Q. Okay. And the next columns, that shows Microsoft Gaming's
23 performance in that metric; right?

24 A. It does.

25 Q. Okay. And I want you to look over to the side. There are

1 bullets that sort of give some explanation or commentary on the
2 metrics; right?

3 A. There are.

4 Q. Okay. Look at the third bullet, please.

5 A. I see it.

6 Q. Okay. So that says that metric has been improving;
7 correct?

8 A. It says it improved in a certain month, yeah.

9 Q. And I want you to look, please, at the footnotes at the
10 bottom. There's footnotes so the board can understand what
11 they're being shown; right?

12 A. There are.

13 Q. Okay. And if you would look at the second -- they're
14 separated by italics; right? So the second footnote is
15 italicized and it refers back to that metric we were just
16 looking at; right?

17 A. Yes, it does.

18 Q. Okay. And it tells us who is included in that relative
19 market share; correct?

20 A. It does.

21 Q. And it tells the board what competitors are excluded from
22 that market share; right?

23 A. It does.

24 Q. Okay. And that information about how those metrics work,
25 you understand that's accurate when it's presented to the

1 board?

2 **A.** The information is accurate.

3 **Q.** And the descriptions are -- I'm sure you try to be
4 accurate when you give them to the board?

5 **A.** Yes, we do.

6 **Q.** Okay. You can put that one aside and look at 188 -- oh,
7 excuse me.

8 **MR. WEINGARTEN:** Move to admit, please, PX1888.

9 **THE COURT:** Admitted.

10 (Trial Exhibit 1888 received in evidence.)

11 **BY MR. WEINGARTEN:**

12 **Q.** Let's try PX1889. This document starts with a chat with
13 the senior leadership team; right?

14 **A.** It does.

15 **Q.** Actually you're also listed on the chat; right?

16 **A.** Yeah. I'm not sure why but, yeah.

17 **Q.** That's okay. You're a member of the senior leadership
18 team of Microsoft?

19 **A.** Yeah. I didn't understand why I was listed twice but,
20 yeah.

21 **Q.** I understand. But for the record, you are a member of the
22 senior leadership team at Microsoft; right?

23 **A.** I am.

24 **Q.** And that's the senior-most leaders across the entire
25 company?

1 **A.** It is.

2 **Q.** Okay. And Ms. Bonita Armstrong tells the senior
3 leadership team that there are some documents attached related
4 to your discussion at the June 15th board meeting. Do you see
5 that?

6 **A.** I do.

7 **Q.** Okay.

8 **MR. WEINGARTEN:** Your Honor, I move to admit PX1889,
9 please.

10 **THE COURT:** Admitted.

11 (Trial Exhibit 1889 received in evidence.)

12 **BY MR. WEINGARTEN:**

13 **Q.** Let's look again at what the board was told. This one is
14 not completely redacted so I can say if you look at page 2,
15 sir, this is called a "State of the Business Report"; right?

16 **A.** It is.

17 **Q.** And this one is from June 2022?

18 **A.** It is.

19 **Q.** So just a year ago. Yes, sir?

20 **A.** Yes, June was a year ago.

21 **Q.** Thank you.

22 And I would like you to look at page 035, please.

23 **A.** (Witness examines document.)

24 **Q.** Are you there, sir?

25 **A.** I am.

1 Q. Okay. Here again are the metrics; correct?

2 A. The same metrics we saw before, yeah.

3 Q. And it looks like the bottom one is not redacted.

4 MR. WEINGARTEN: I'm looking at Counsel for Microsoft.
5 Can I say it?

6 MS. WILKINSON: Can I see it redacted?

7 MR. WEINGARTEN: Okay. Then I won't say it.

8 MS. WILKINSON: Can we just --

9 MR. WEINGARTEN: Yeah, come look at mine.

10 (Pause in proceedings.)

11 MR. WEINGARTEN: I won't do the numbers.

12 BY MR. WEINGARTEN:

13 Q. So if you look at the fourth metric, sir, the fourth
14 metric that the board is being told about is console Gen 9
15 share; right?

16 A. It is.

17 Q. And if you look at the explanatory bullet to the right,
18 don't say it out loud but read it to yourself, please, about
19 console Gen 9 share.

20 A. (Witness examines document.)

21 Q. Have you read it?

22 A. I have read it.

23 Q. Okay. And your belief is that -- do you understand that
24 to be an accurate representation of Microsoft Gaming's position
25 with respect to console Gen 9 share at the time this

1 presentation was made?

2 A. In January of 20 -- June of 2022, yes.

3 Q. Okay. And you'll see there's a description of some
4 markets there. Do you see that?

5 A. I do.

6 Q. Okay. And those are broken out by different geographies;
7 right?

8 A. They are.

9 Q. Okay. And they're called the key markets; right?

10 A. Just key. There's no "the."

11 Q. Sorry. In key markets?

12 A. Yeah.

13 Q. Okay. And if you look again -- strike that.

14 You can put that one aside, sir.

15 I'd like you to look, please, at PX1887.

16 A. (Witness examines document.)

17 Q. Now, this document is an e-mail from you to the Gaming
18 leadership team and Mr. Leder of ZeniMax; right?

19 A. It is.

20 Q. And you're talking here about a meeting that you attended
21 with the Microsoft Board of Directors?

22 A. Yes.

23 Q. And it's, again, from November -- this one's from November
24 of 2022 so six months later from the --

25 A. Yes, yes.

1 Q. Okay. So just roughly six or seven months ago?

2 A. Yes.

3 Q. Okay. And if you would, please, look, you say "My" -- in
4 the third paragraph you say "My talk track was" --

5 MR. WEINGARTEN: Oops, sorry. I assume that's okay.

6 MS. WILKINSON: Yes. He says it all the time.

7 BY MR. WEINGARTEN:

8 Q. Okay. So your talk track, that means the things that you
9 told the board basically in this particular example?

10 A. Yes.

11 Q. Okay. I won't read this one, but the second bullet point,
12 you see what's that says? Just the first sentence?

13 A. Yes.

14 Q. Okay. Is that accurate about what you told the board in
15 November of 2022?

16 Just I really only care about the first sentence of that
17 bullet. It starts with "I" and ends with something, a period.

18 A. That -- that's -- can you just ask the question
19 specifically again?

20 Q. All right. I just want to make sure when you told that to
21 the Gaming leadership team that that's what you told the board,
22 was that -- were you being accurate?

23 A. I think we're misreading. My point there was that topic.

24 Q. I understand.

25 A. It's the first topic I talked -- or the second topic I

1 talked about with the board.

2 Q. I understand. And that was the topic that you talked
3 about with the board?

4 A. That's right.

5 Q. Okay. Was that company?

6 A. Sorry?

7 Q. About that company --

8 A. Yes.

9 Q. -- that's mentioned?

10 A. Yeah.

11 Q. Okay.

12 All right. You can put that one aside.

13 MR. WEINGARTEN: Move to admit PX1887, Your Honor.

14 THE COURT: Admitted.

15 (Trial Exhibit 1887 received in evidence.)

16 MR. WEINGARTEN: Thank you.

17 BY MR. WEINGARTEN:

18 Q. Now, do you remember, sir, there have been discussions
19 among members of the Gaming leadership team about whether to
20 include Nintendo in metrics for console share?

21 A. Is there a specific conversation?

22 Q. I'm just asking if you remember that there were
23 discussions among Gaming leadership team members about whether
24 to include Nintendo in metrics about console share.

25 A. I can agree that we've probably talked about that. I

1 don't -- I don't have a specific conversation in mind.

2 **Q.** Okay. And there was a period of time when Nintendo was
3 not included in the share metrics because the PlayStation 5 and
4 the Xbox Series X and S all launched on the same effective
5 date; right?

6 **A.** We are -- there are different views we have of our share.
7 Some of those shared metrics include both Sony and Nintendo,
8 others do not. When we talk about the current generation of
9 consoles, we're usually talking about all three that are
10 available in the market when a consumer walks in the store,
11 which are the three or four in front of you today.

12 And -- but you're right, that PlayStation 5, Xbox Series X
13 and S launched at similar timeframe. So many times on launched
14 alignment views we will show just those two.

15 **Q.** Well, the biggest driver in your view, sir, of why
16 Nintendo would not be included in Gen 9 share is because the
17 Xbox series consoles and the PlayStation 5 launched on the same
18 date and those consoles are at the same place in their life
19 cycle and the Nintendo is not; right?

20 **A.** That is a consideration definitely when we're looking at
21 the sales of PlayStation versus Xbox is they launched at
22 similar time.

23 **Q.** And I appreciate it's a consideration. My question is:
24 That's the reason or part of the reason why Nintendo was not
25 included in Gen 9 console share by the GLT, the Gaming

1 leadership team; right?

2 **A.** I honestly am not trying to be difficult. I just want to
3 be sure.

4 I get a weekly report on share that shows Nintendo, Sony,
5 and Xbox run rate, say, in the U.S. So that's a view I see all
6 the time. If there's a specific view that you want me to look
7 at to say why are we not including Nintendo in that view, I'm
8 happy to create, like, a positive assertion for your point.

9 **Q.** Sure. Let's look in your deposition, please, your
10 deposition transcript, not the investigational hearing.

11 **A.** Yeah.

12 **Q.** And it's page -- little page 158. So transcript page 158.

13 **A.** That's the little number?

14 **Q.** Yeah. The transcripts binder. It says "Previous
15 Testimony" on the cover that -- you got it.

16 **A.** Yeah. And the little number 158?

17 **Q.** The little number 158.

18 **A.** Thank you.

19 **Q.** Are you there, sir?

20 **A.** I am.

21 **Q.** Okay. And look at line 16 (as read):

22 **"QUESTION:** Okay. Do you remember any discussion amongst
23 GLT members about whether to include Nintendo in metrics
24 regarding console share?

25 **"ANSWER:** We have had those discussions.

1 **"QUESTION:** Was there a period of time when Nintendo was
2 not included in Gen 9 share metrics, like how we saw it
3 was not included?

4 **"ANSWER:** Yes.

5 **"QUESTION:** Okay. Why was that?

6 **"ANSWER:** My belief is the biggest drivers because
7 PlayStation 5 and Xbox Series X and S all launched on the
8 same effective date.

9 **"QUESTION:** Why would that lead you and the GLT to not
10 include Nintendo in calculations of share for console?

11 **"ANSWER:** Because PlayStation 5 and Xbox Series X are at
12 the same place in their life cycle in the consumer
13 market."

14 **A.** That's correct.

15 **Q.** That was your testimony; correct?

16 **A.** Yes.

17 **Q.** And it was truthful and accurate?

18 **A.** It was.

19 **Q.** Okay. Thank you.

20 Now, you mentioned a minute ago in your testimony that
21 there are times when you include PlayStation 5, the Xbox series
22 consoles, and Switch in the share metrics; right?

23 **A.** That's correct.

24 **Q.** And you do that and you include all three and not just the
25 Xbox series and the PlayStation 5 when you're trying to show a

1 global perspective of Xbox's relevance; right?

2 **A.** That's not right.

3 **Q.** Okay. Could you please turn, the same page actually,
4 little number 161?

5 **A.** (Witness examines document.) Yes.

6 **Q.** If you look at line 6 (as read):

7 **"QUESTION:** Did there come a time where Nintendo was added
8 back into the share calculation for console along side X,
9 S, and PS5?

10 **"ANSWER:** There are times when we show all three and
11 there's times when we show two.

12 **"QUESTION:** Any overall factors you can tell us as to when
13 you show all three versus showing just Xbox and
14 PlayStation 5?

15 **"ANSWER:** When we're trying to show an accurate global
16 perspective of our relevance, we would show all three."
17 That testimony was truthful and accurate when you gave it?

18 **A.** Yes.

19 **Q.** Okay. Would you agree that in the United States Xbox's
20 market share versus Sony has traditionally been more
21 competitive than in Europe?

22 **A.** We've been behind Sony the whole time in the U.S.

23 **Q.** Would you agree, sir, in the United States Xbox's market
24 share versus Sony has traditionally been more competitive than
25 in Europe?

1 **A.** Than in Europe, it is, yes.

2 **Q.** Let's take a look in your binder --

3 **THE COURT:** Is this a good time to take our break?

4 **MR. WEINGARTEN:** Certainly, Your Honor. Whatever is
5 convenient for the Court.

6 **THE COURT:** All right why don't we take our 15-minute.
7 Morning break.

8 **MR. WEINGARTEN:** Thank you.

9 (Recess taken at 10:05 a.m.)

10 (Proceedings resumed at 10:20 a.m.)

11 **THE COURT:** Okay. You may resume.

12 **MR. WEINGARTEN:** Thank you, Your Honor.

13 **BY MR. WEINGARTEN:**

14 **Q.** I want to talk to you a little bit now, Mr. Spencer, about
15 Sony and the so-called console wars; right? You're familiar
16 with the "term console wars"?

17 **A.** Yes, I am.

18 **Q.** Okay. And that roughly refers to the intense competition
19 in the console space in the United States?

20 **A.** I actually think it probably more reflects the fans of the
21 different platforms and the social commentary more maybe akin
22 to like sports fans for their local team.

23 **Q.** Do you think that Microsoft Gaming's Xbox lost the console
24 wars?

25 **A.** As the console wars is a social construct with the

1 community, I would never want to count our community out.
2 They're big fans. If you look at our market share in the
3 console space over the last 20-plus years, we're in third
4 place. We've remained in third place for quite a while. I
5 think it's hard to look at our position now and see us in
6 anything other than in third place.

7 Q. And part of the reason what that means in practical effect
8 is the Xbox just didn't sell as much as, say, Sony?

9 A. Yeah, we're behind Sony and Nintendo in console share
10 globally.

11 Q. Okay. Could you please turn in your binder to PX1145,
12 please?

13 A. This is in the documents binder; correct?

14 Q. Yes, sir. Thank you.

15 A. (Witness examines document.) I have it.

16 Q. Okay. This is an e-mail chain between you and Mr. Tim
17 Stuart; right?

18 A. Yes, it is.

19 Q. Mr. Stuart is the CFO of Microsoft Gaming; right?

20 A. Yes, he is.

21 Q. And this is an e-mail chain dated December 4th, 2020?

22 A. Yes, it is.

23 Q. And that's right around the time that the Xbox series
24 consoles launched; right?

25 A. Yes.

1 Q. Okay. And the bottom e-mail on page 1 is the start of the
2 chain. It's a lengthy, lengthy e-mail from you to
3 Mr. Spencer [sic] with the subject "Xbox Console Volume";
4 right?

5 A. Yes.

6 Q. Do you remember what month in 2020 the Xbox Series X and S
7 launched, roughly?

8 A. November.

9 Q. Okay. So this is just right after the launch then; right?

10 A. Yes.

11 Q. Could you please turn to page 002? And this paragraph,
12 the second paragraph, is highlighted so don't say it out loud.
13 I want you to look at the first sentence that says "I believe."
14 Do you see that?

15 A. I do.

16 Q. Can you read that sentence to yourself? And I'm going to
17 ask you if that sentence was truthful and accurate when you
18 made it.

19 A. (Witness examines document.) Yeah, I wrote that to Tim
20 believing I was being truthful.

21 Q. Okay. And if you would please look at the -- one, two,
22 three -- fourth sentence. It says "Sony." Don't read the
23 rest. Do you see that? And then it ends up with the word
24 "coming," that sentence?

25 A. It ends with the word "coming," yeah, I see that.

1 Q. Okay. So read that sentence to yourself, please.

2 And you also believed that when you wrote it to Mr. Stuart
3 at the time of the launch; right?

4 A. I did.

5 Q. Okay. And you believed it at the time?

6 A. I believed it at the time.

7 Q. Okay. Fair to say that you view Sony as an aggressive
8 competitor?

9 A. Yeah, Sony is the market leader with considerable
10 capability and an aggressive competitor and leader.

11 Q. Okay. And in your view, the Sony PlayStation platform is
12 hostile to Xbox's survival?

13 A. Yeah.

14 Q. Okay. And in your view, shipping more content on a
15 platform that is hostile towards Xbox's survival feels like
16 you're enabling an aggressive competitor to further damage you;
17 right?

18 A. Every time we ship a game on PlayStation going back to the
19 70/30 revenue split that we discussed, Sony captures 30 percent
20 of the revenue that we do on their platform, and then they use
21 that money, among other revenue that they have, to do things to
22 try to reduce Xbox's survival in the market.

23 Q. So there's a lot of competition between Sony and Xbox;
24 right?

25 A. We try to compete; but as I said, over the last 20 years,

1 we've failed to do that effectively.

2 **Q.** And it's your view that if you are shipping more content
3 on Sony PlayStation, a platform that's hostile towards Xbox's
4 survival, that would feel like enabling an aggressive to damage
5 you; right?

6 **A.** It enables them to take the revenue they make off of our
7 products to sign third-party exclusive deals to block games
8 from our platform to price their console at a certain level.
9 So they -- they have the opportunity to use the revenue from
10 the games that we ship on their platform to block Xbox's
11 survival.

12 **Q.** Let me show you -- if you go to your investigational
13 hearing transcript, please, sir. It's in the testimony binder.
14 It's the bigger -- it's PX7011. It's page -- I'll do the big
15 numbers -- 7011-092.

16 **A.** (Witness examines document.)

17 **Q.** If you look at little page 363, that's the transcript
18 page, please, line 14.

19 And the question was actually about multiplayer and
20 cross-platform so (as read):

21 **"QUESTION:** Why not have multiplayer games launch also on
22 PlayStation so that folks can have cross-platform play?

23 **"ANSWER:** I believe right now one of the biggest risks to
24 Xbox's survival is that what I've mentioned of Sony paying
25 Teams to exclude Xbox from their shipping platforms. So

1 if I'm shipping more content on a platform that is hostile
2 towards Xbox's survival, I feel like I'm enabling an
3 aggressive competitor to further damage our aspirations."

4 That was your testimony?

5 **A.** It is.

6 **Q.** And it's truthful and accurate?

7 **A.** Yeah, I think it's in line with what I just said.

8 **Q.** And it's about -- and that was in response to a question
9 about having cross-platform games and multiplayer games launch
10 also on PlayStation; right?

11 **A.** It was.

12 **Q.** Okay. Now --

13 **MR. WEINGARTEN:** Oh, I again forget to -- I apologize,
14 Your Honor. Can I move to admit PX1145?

15 **THE COURT:** Yes, admitted.

16 (Trial Exhibit 1145 received in evidence.)

17 **MR. WEINGARTEN:** I will do better.

18 **BY MR. WEINGARTEN:**

19 **Q.** You and your team analyze Sony PlayStation price changes
20 and determine responses accordingly; right?

21 **A.** Yeah, we try to compete in the market on price.

22 **Q.** Okay. I want to talk to you about a different market.
23 Let's move off consoles for a second and talk about
24 subscription.

25 Microsoft Gaming tells developers that Game Pass --

1 joining Game Pass with their games is accretive to standalone
2 game sales; right?

3 **A.** We have said that in the past.

4 **Q.** That's a message that Microsoft Gaming says to developers
5 whom it wants to put their games on Game Pass; right?

6 **A.** It is a message we've used in the past when we're
7 describing Game Pass to developers. Now our message is more
8 around the financial investment that we can make in their
9 creative to help support them doing innovative things with
10 their games.

11 **Q.** Okay. And you would agree that fundamentally Game Pass is
12 a reach bet to get off of console fueled by console users as an
13 early catalyst?

14 **A.** Game Pass is a business model that we think has more reach
15 capability than \$70 retail games, yeah.

16 **Q.** And it's a bet to get off of console; right?

17 **A.** It is definitely a bet to get to every endpoint where
18 somebody wants to play.

19 **Q.** To do that you have to get off console with Game Pass;
20 right?

21 **A.** We would include console. We see console as part of our
22 future so I would -- I would talk about it more as expanding
23 beyond just console; but off console kind of presumes that we
24 would leave console, which isn't our goal with Game Pass.

25 **Q.** Okay. Can you please turn in your deposition transcript

1 to the little page 225, transcript page 225. And I'm going to
2 look at line 8, please, on little page 225.

3 A. (Witness examines document.)

4 Q. Let me know when you're there. Sorry.

5 A. Yeah. Sorry.

6 Q. Take your time.

7 A. (Witness examines document.) I'm on 225.

8 Q. Okay. Look at little -- look at line 8, please. That's
9 me asking you a question (as read):

10 "You write 'Fundamentally GP is a reach bet off of
11 console fueled by console users as an early catalyst.'
12 Still agree with that?"

13 And your answer was "Yes."

14 Was that truthful and accurate testimony when you gave it?

15 A. Yes.

16 Q. Okay. And "GP" there means Game Pass?

17 A. It does.

18 Q. Game Pass is a reach bet off of console?

19 A. I would include console. Game Pass is available on
20 console. So it -- Game Pass is available on console PC, so
21 it's inclusive of all of those.

22 Q. Okay. Let's talk about the role of content in
23 subscription services like Game Pass.

24 It is your view that Microsoft needs a predictable cadence
25 of AAA launches in its products and services; right?

1 **A.** For our customers I think having games that our customers
2 are anticipating that they know the ship dates for, that they
3 can see into the future, is an important part of their
4 investment in our platform.

5 **Q.** So is the answer to my question "Yes"?

6 **A.** I think I affirmed your question, yes.

7 **Q.** And it is your view that Microsoft needs AAA content to
8 drive acquisition of users across its services?

9 **A.** We need AAA content, yes.

10 **Q.** You need AAA content to drive acquisition of users?

11 **A.** Acquisition and retention.

12 **Q.** Of users?

13 **A.** Of users.

14 **Q.** Of the products and services that Microsoft offers?

15 **A.** Products and services that Microsoft offers, yes.

16 **Q.** Thank you.

17 And adding more content to Game Pass subscription service
18 is one of the things that you believe will increase the number
19 of subscribers across many different devices for Game Pass;
20 right?

21 **A.** As users are making their bet on Game Pass and subscribing
22 and choosing to stay subscribed, great content coming to the
23 subscription we believe is important for that.

24 **Q.** So adding more content to a subscription service like
25 Game Pass increases the number of subscribers; right?

1 **A.** That's our goal.

2 **Q.** And subscriber scale, meaning the number of subscribers,
3 is imperative for a successful subscription service in gaming;
4 right?

5 **A.** Having a large number of subscribers is important to our
6 subscription success, yes.

7 **Q.** In fact, having scale and subscribers is imperative, in
8 your view, to success in gaming subscription; right?

9 **A.** Yes.

10 **Q.** Have you ever expressed the view that you want to make it
11 clear to Google, Amazon, and others that they will not catch up
12 to Microsoft in gaming at all, not just in subscriber numbers?

13 **A.** For us gaming is a capability that Microsoft has where we
14 want to continue to extend our capability and show leadership
15 relative to potential competitors or today's competitors.

16 **Q.** And I appreciate that, but my question was: Have you ever
17 said that you want to make it clear to Google and Amazon that
18 they will not catch up to Microsoft in gaming all in, not just
19 in terms of subscribers even?

20 **A.** Yeah, I believe I've said that.

21 **Q.** Okay. And have you also -- do you also believe that
22 content is part of the differentiator for Microsoft versus
23 Google and Amazon in subscription?

24 **A.** Gaming content is today, yes.

25 **Q.** So I'll make it more clear. I thank you for the

1 correction.

2 Gaming content is a differentiator for Microsoft versus
3 Google and Amazon in video game subscription services; right?

4 **A.** It is today, yes.

5 **Q.** Just briefly on -- we've heard a lot of testimony, you've
6 been here for it, about AAA games; right's.

7 There are relatively few AAA titles released in a year
8 relative to the total number of titles released in gaming in a
9 year; right?

10 **A.** Yeah. Given -- yes. Given the number of independent
11 titles that are developed in the market, the number of -- I
12 think you can equate maybe Blockbuster that is used in movies
13 with AAA games -- that AAA games are a small part of the
14 overall game releases in a given year.

15 **Q.** There may be 10 to 20 AAA games out of 300 or 400 total
16 console game titles that are released?

17 **A.** I don't have those exact numbers in my head, but there are
18 a lot more independent and smaller games than there are AAA
19 games developed in a year.

20 **Q.** Okay. Let's take a look, please, at your investigational
21 hearing transcript page 38. It's the little 38. So
22 PX7011-011. Those are the big numbers at the bottom. And then
23 it's investigational hearing transcript page 38.

24 **A.** (Witness examines document.) I'm on that page.

25 **Q.** And the question I'm interested in starts at line 22 (as

1 read):

2 **"QUESTION:** How many AAA games do you think come out in a
3 year -- in a given year in your experience?

4 **"ANSWER:** I would say there's -- there are probably 10 to
5 20 AAA games in a given year -- calendar year.

6 **"QUESTION:** And how many games -- let's say, console --
7 how many console games do you think launch -- titles
8 launch in a given year, give or take?

9 **"ANSWER:** 300 to 400."

10 Those are the estimates you gave under oath; right?

11 **A.** In October of '22, yes.

12 **Q.** Okay. And that was truthful and accurate when you gave
13 it?

14 **A.** That was the best of my guess in October of '22, yes.

15 **Q.** Okay. Let's talk a little bit more about content.

16 Every year the Gaming leadership team publishes to the
17 gaming organization a strategy document; right?

18 **A.** We try to. I think there's some years we've missed but,
19 yes, we try to.

20 **Q.** And the annual strategy document presents the annual
21 strategy and shows a view on the long-term trends in the
22 business; right?

23 **A.** Yeah. It's the document we try to use to align the team
24 behind the strategy.

25 **Q.** Please turn in your binder to PX1065.

1 **A.** This is the document binder; right?

2 **Q.** Yes, sir. The other one.

3 **A.** (Witness examines document.) I'm at the document. Or
4 it's a mail exchange; right?

5 **Q.** Yeah. The first cover is an e-mail exchange, and the top
6 e-mail is from Mr. Hampton to some listserv called "Gaming
7 Business Planning and Strategy." And the next e-mail down is
8 from you to, among others, Ms. Hood and Mr. Nadella; right?

9 **A.** It is.

10 **Q.** All right.

11 **MR. WEINGARTEN:** Move to admit PX1065, please.

12 **THE COURT:** Admitted.

13 (Trial Exhibit 1065 received in evidence.)

14 **BY MR. WEINGARTEN:**

15 **Q.** Now, this is a strategy document that's about a particular
16 potential acquisition; right?

17 **A.** It is.

18 **Q.** Okay. But you attached a memo describing gaming strategy
19 at this time to some pretty senior executives, including Amy
20 Hood and Mr. Nadella; right?

21 **A.** Yes.

22 **Q.** And I want to turn you, please, to page 017 and it's
23 bullet point 9.2, and it says "Xbox Game Pass State of the
24 Union." So this is you're giving Ms. Hood and Mr. Nadella an
25 overview here; right?

1 **A.** It's hard to read it this way. This is the strategy
2 document that was attached to the e-mail. So this is the
3 strategy document that we used for the entire org and we
4 attached it so Amy and Satya would have access to this
5 document, yes.

6 **Q.** Great.

7 And if you look at number 1 -- well, right above the
8 number 1, it says (as read):

9 "To that end, Xbox Game Pass faces three primary
10 content dynamics."

11 And the number one dynamic listed is "Need for
12 differentiated content," and then you're explaining to Ms. Hood
13 and Mr. Nadella that (as read):

14 "For gaming, 'differentiated content' means investing
15 in content that is, one, exclusive to the service to
16 differentiate relative to other services; two, blockbuster
17 in scale to attract and engage users; and, three, released
18 on a day-and-date basis; i.e., releases in the service on
19 the day it launches to maximize the value of the content
20 to subscribers."

21 Do you see that?

22 **A.** I do see that.

23 **Q.** That's the definition of "differentiated content" that you
24 gave to Ms. Hood and Mr. Nadella?

25 **A.** It was in the strategy document that was attached to the

1 other request, yes.

2 Q. Do you see number 2 there, "Expanding Beyond Console"?

3 A. I do.

4 Q. Do you see how it says "PC and cloud dramatically expand
5 our market opportunity"?

6 A. Yes, I see that.

7 Q. So PC gaming and cloud gaming will dramatically expand the
8 opportunity for Microsoft beyond its traditional areas like
9 console; right?

10 A. This is in a subsection talking about Game Pass, so
11 talking about where Game Pass can find new users.

12 Q. And then the next point, number 3, is "Limited content
13 supply," and it says (as read):

14 "Different than other entertainment markets, the
15 supply of attractive games is structurally limited."

16 Do you see that?

17 A. I do see that.

18 Q. Okay. You told that point to Ms. Hood and Mr. Nadella in
19 this document also; right?

20 A. Yeah. It's in the same document, yes.

21 Q. You can put that aside, please.

22 A. Okay.

23 Q. I want to talk to you a little bit about Activision
24 content.

25 Activision is a publisher of AAA games?

1 **A.** Activision is a publisher of AAA games on console, PC, and
2 mobile games, which we don't usually use the -- the users don't
3 usually use AAA when discussing mobile games. So they -- they
4 develop games across all three platforms. Some of them are AAA
5 games.

6 **Q.** Okay. Call of Duty is a AAA game; correct?

7 **A.** I would consider Call of Duty a AAA game.

8 **Q.** I want to take you back in time, we're not going to do
9 details in open court, but take you back to 2020 when Microsoft
10 Gaming and Activision were negotiating to get Call of Duty onto
11 the Xbox X and S in time for the launch of those products. Do
12 you remember that?

13 **A.** I do remember.

14 **Q.** Okay. And Microsoft made an offer -- let me see how I
15 want to do this.

16 **MR. WEINGARTEN:** One second, Your Honor, while I try
17 to figure out to work around?

18 **THE COURT:** Of course.

19 **MR. WEINGARTEN:** Thank you.

20 (Pause in proceedings.)

21 **BY MR. WEINGARTEN:**

22 **Q.** Okay. There were different offers for Activision with
23 respect to where their content would be located; right? So
24 console revenue share would be different than PC share;
25 correct. I can't say the numbers.

1 A. Well --

2 Q. I don't want to say the numbers.

3 A. -- I appreciate us not saying the numbers in the room.

4 Q. Yeah.

5 A. I'm --

6 Q. I'll try it better.

7 A. Okay.

8 Q. In negotiating with Activision, Microsoft put forward a
9 proposal about a revenue share for revenues on Activision
10 content sold on the console; right?

11 A. That would be part of the proposal that we would make to a
12 partner, yes.

13 Q. You also put forward a proposal for a revenue share for
14 content sold for PC games; right?

15 A. I don't remember that specifically, but it would be a
16 normal part of us working with a partner.

17 Q. Okay. Let's look at page 118 -- well, it's the IH
18 transcript, your investigational hearing. It's that PX7011 and
19 it's the page PX7011-031, page 118 and 119 of the little
20 transcript pages.

21 A. I'm on the page.

22 Q. Okay. And look at page 118, lines 14 to 16. Your answer
23 continues to 18, but I'm trying to get to the numbers here. Do
24 you see that?

25 A. I do see 118, yes.

1 Q. And you see lines 14 to 17?

2 A. Yes.

3 Q. It says "On," question "On"?

4 A. Yeah.

5 Q. Okay. So that first clause "On" and it talks about the PC
6 store, that's the revenue split that Microsoft offered to
7 Activision for games in the PC store; right?

8 A. I believe that's true, yes.

9 Q. If you look at the second split in that question, it says
10 (as read):

11 "We talked earlier about the rationale for sometimes
12 offering blank economic split."

13 Do you see that?

14 A. I do.

15 Q. Okay. That's the traditional economic split that
16 Microsoft offers for PC store?

17 A. That Microsoft does, yes.

18 Q. Okay. So if you look at the top number, that's what was
19 offered to Activision, the bottom number on line 16 is the
20 traditional customary split; right?

21 A. It looks to be true, yes.

22 Q. Okay. And let me try it this way.

23 Look at page 126, please, of your investigational hearing,
24 same document, just transcript page 126. Sorry. Transcript
25 page.

1 A. I'm there.

2 Q. Okay. Look at lines 8 through 12.

3 Okay. So that's a contrast of the splits for the console
4 piece; right? "The first number is so at blank," that blank is
5 the offer?

6 A. It is.

7 Q. And the next one is the customary; right?

8 A. It is.

9 Q. 70/30 is the customary. And your testimony was that the
10 offer split that was made to Activision, and you see what you
11 said about it?

12 A. I do.

13 Q. Was that truthful and accurate?

14 A. It was.

15 Q. Okay. And you were willing to make that kind of offer
16 that would have had that impact that you're describing on 126,
17 lines 10 to 13, because you had to make the economics good
18 enough for Activision to not skip Xbox X and S; right?

19 A. That was the threat.

20 Q. Okay. And you were willing to do that kind of offer with
21 those effects because you could not afford to have Activision
22 skip Xbox console with key franchises; right?

23 A. I would say it's too simplistic to talk about an
24 individual title. In the overall Xbox trying to compete with
25 the competitive platforms, there were a number of third-party

1 games that the competition was paying to exclude Xbox which had
2 already been announced. One of those games launched this week,
3 Final Fantasy XVI not coming to Xbox.

4 So knowing that we have a competitor who is actively
5 signing third-party games to skip our platform, it became more
6 important for us, for our customers, and for continued sales of
7 our console that we're able to secure third-party games onto
8 our platform inclusive of Call of Duty.

9 Q. Okay. And so because of a fear that Sony might pay
10 Activision to skip Xbox console with a key franchise, you had
11 to make an offer to get that content? You needed that content
12 for Xbox; right?

13 A. We needed to do a lot of work with a lot of partners given
14 the competitive situation we had against the market leader.

15 Q. And if you own content, you don't have to pay it to be
16 exclusive on Xbox anymore, do you? You don't pay the companies
17 that are already part of Microsoft, do you?

18 A. We pay them a salary but, yes, we don't pay them.

19 (Laughter)

20 THE WITNESS: We don't pay for exclusivity on our own
21 platform.

22 BY MR. WEINGARTEN:

23 Q. That factor falls out once you actually own the company;
24 right?

25 A. There is an overall profitability of a title so we're

1 obviously paying the employees to work on the game, to market
2 the game.

3 So when you exclude platforms, it does hurt the financial
4 return on the individual game that you're working on; but it --
5 yes, it's obviously true that there's no other entity that
6 you're having to pay directly.

7 **Q.** Okay. And one of the benefits of owning content in
8 gaming, from your perspective, is that it enables Microsoft to
9 be the decision maker about what platforms that gaming content
10 will appear on; right?

11 **A.** What I would say more recently is that with a competitor
12 who's paying third parties to skip our platform, that we felt
13 it's necessary for us to secure ownership of more content so we
14 can have more input into that content on our platform and in
15 our subscription.

16 I think ZeniMax is a great example; that when we acquired
17 ZeniMax, one of the impetus for that was that Sony had done a
18 deal for Deathloop and Ghostwire, as came up yesterday, to pay
19 effectively Bethesda to not ship those games on Xbox.

20 So the discussion about Starfield, when we heard that
21 Starfield is potentially also going to end up skipping Xbox, we
22 can't be in a position as a third-place console that -- where
23 we fall further behind on our content ownership. So we've had
24 to secure content in order to remain viable in the business.

25 **Q.** Right. And my question was a little -- maybe I was

1 inartful, but I meant it to be more simple.

2 Another benefit of owning content in gaming from your
3 perspective is that it enables Microsoft to be the decision
4 maker about what platforms that content appears on; right?

5 A. That's one of the benefits, yes, it is.

6 Q. Okay. And in your entire time -- how long have you been
7 at Xbox?

8 A. I started at Xbox in 2001.

9 Q. Okay. In the entire time that you've been at Xbox,
10 there's always been discussions about the role of exclusives
11 and the impact of exclusives on Xbox platform sales; right?

12 A. It is -- it's been a topic, yes, over the two decades that
13 Xbox has been in the business.

14 Q. And you've had discussions in your role in Xbox about the
15 financial implications of not shipping on other platforms,
16 including not shipping on PlayStation; right?

17 A. The discussion's a little more complete than just not
18 shipping on Xbox. A decision we make with all of our games is
19 to ship on Xbox and Windows PCs, and there's a financial upside
20 when we ship on Windows PCs. It has an impact on potentially
21 somebody buying an Xbox because obviously you can play the game
22 on PC. So we have complete discussions about where content
23 will show up in the overall return to us.

24 Q. Well, you've had conversations and participated in
25 conversations, at either the senior leadership team for all of

1 Microsoft or the Gaming leadership team for gaming, about the
2 economic costs and benefits of Microsoft Gaming skipping
3 PlayStation with a title; right?

4 **A.** That would be more of a Gaming leadership team discussion
5 than it would be a Microsoft senior leadership team discussion.

6 **Q.** And those discussions about the economic costs and
7 benefits of Microsoft skipping PlayStation with a title have
8 happened; right?

9 **A.** Again, I'd just say when we're thinking about where a
10 title is, we're thinking about the overall financial impact of
11 us shipping a title inclusive or exclusive of certain
12 platforms.

13 **Q.** Let's look, please, in your investigational hearing
14 transcript, it's PX7012. This is Volume II of the transcript,
15 7012, and it's page 013 of PX7012.

16 **A.** (Witness examines document.) I'm on the page.

17 **Q.** Okay. Little transcript page 441, I started to ask a
18 question. I screwed it up so I asked a better one I hope.
19 Line 25 (as read):

20 **"QUESTION:** I want to understand more about" -- and it
21 continues. Do you see that? -- "Other than just general
22 discussions about shipping on platforms, have you talked
23 about, at either SLT or GLT, the economic costs and
24 benefits to Microsoft Gaming of skipping PlayStation with
25 a title?"

1 Your answer was "Ever?" And I clarified "Yes." And you
2 said (as read):

3 **"ANSWER:** We have had discussions about the financial
4 implications about not shipping on other platforms.

5 **"QUESTION:** Including not shipping on PlayStation?

6 **"ANSWER:** Including not shipping on PlayStation."

7 That was your testimony?

8 **A.** Yes.

9 **Q.** Truthful and accurate when you gave it?

10 **A.** It is.

11 **Q.** Okay. You've also participated in conversations at
12 Microsoft about whether to skip PlayStation with Microsoft
13 first-party titles; right?

14 **A.** Sorry. Maybe I misunderstood. I thought the last
15 discussion was about first-party titles.

16 **Q.** Okay. Good. So then we've had those -- you have had
17 those conversations; right? We established that?

18 **A.** Yes.

19 **Q.** Okay. But you don't remember anything specific about
20 those conversations?

21 **A.** We have discussions, and I think the -- our back and forth
22 four months ago on this was similar where you put a context.
23 We have overall discussions about the financial impacts of a
24 piece of content inclusive of what platforms it ships on.

25 If what you want is a specific of the PlayStation

1 component of an overall analysis, I obviously have a general
2 recollection; but if it's going to be about a specific number,
3 I'll probably need a document to look at.

4 **Q.** Well, you can't provide any more -- I appreciate your
5 testimony about the conversations that have happened, but you
6 can't remember or can't provide any more detail than what we
7 just discussed about those conversations; correct?

8 **A.** I could talk longer about it if we want to.

9 (Laughter)

10 **BY MR. WEINGARTEN:**

11 **Q.** All right. Look at your -- same page of your
12 investigational hearing transcript, page 443, line 17, question
13 was (as read):

14 "Can you provide me any more detail about those
15 conversations?"

16 And your answer was (as read):

17 "Only -- only to say that my entire time at Xbox
18 there's always been a discussion about the role of
19 exclusives and the impact on our platform sales."

20 So that was your answer then; right?

21 **A.** It was.

22 **Q.** Okay. And that was truthful and accurate; right?

23 **A.** It was.

24 **Q.** Now, you've told a colleague before that you actually
25 don't see a point in putting out individual games on other

1 platforms; right?

2 A. I'm -- I guess -- have I told a colleague before?

3 Q. That you do not see a point in putting individual games on
4 other closed platforms.

5 A. Ah, sorry. Yes.

6 Q. Okay. That's not a one-off statement. You've said that
7 other times likely; right?

8 A. I have.

9 Q. All right. You've had conversations at Microsoft about
10 skipping PlayStation with Activision titles; right?

11 A. I think when we're looking at the -- any content we own,
12 we should look at all the capabilities that we have with the
13 content.

14 Q. So you've had conversations with -- at Microsoft about
15 skipping PlayStation with Activision titles? Yes or no.

16 A. I don't remember a specific conversation, but I could --
17 it would seem like a normal conversation for us to have.

18 Q. Let me -- let me refresh your recollection then. Take a
19 look at page 465, same transcript, look at line 7 on little
20 transcript page 465. Do you see that? Look at 7 to 12. Read
21 that to yourself.

22 A. (Witness examines document.) Yes.

23 Q. Does that refresh your recollection that you have had
24 conversations at Microsoft about skipping PlayStation with
25 Activision titles?

1 **A.** Yes.

2 **Q.** So you have had those conversations?

3 **A.** I remember having -- well, I don't remember the specific
4 conversations, but we would have had conversations about that.

5 **Q.** Okay. So to be clear, you do remember that there are
6 conversations about whether to skip PlayStation with Activision
7 content, but you don't remember any of the detail?

8 **A.** I remember the result we came up with, which was the
9 financial model that we presented to the board, which included
10 shipping the games on PlayStation.

11 **Q.** Okay. And other than that, you don't remember the details
12 of any of the conversations about skipping PlayStation with
13 Activision content?

14 **A.** Only the final result, which was that we would continue to
15 ship on PlayStation.

16 **Q.** Okay. And that's the final result that was put into the
17 Denali model in the board deck?

18 **A.** Yes.

19 **Q.** Let's talk about the model a little bit.

20 When evaluating an acquisition --

21 **MR. WEINGARTEN:** Your Honor, do you want to pause for
22 a second?

23 **THE COURT:** No.

24 **MR. WEINGARTEN:** Oh, sorry.

25 \\\

1 **BY MR. WEINGARTEN:**

2 **Q.** When evaluating an acquisition, Microsoft looks at both
3 the economic value and the strategic value; correct?

4 **A.** Yes, we do.

5 **Q.** And the economic value is what is the near-term financial
6 return have to be to justify the valuation given; right?

7 **A.** Yes.

8 **Q.** Okay. And the economic value is about what you pay to
9 acquire an asset, but that's not the same as the strategic
10 value of the asset to Microsoft; right?

11 **A.** The strategic rationale and the financial rationale are
12 two different discussions.

13 **Q.** And do you agree that it may be the case that an asset has
14 significant strategic value that may, in fact, outweigh the
15 economic value? Correct?

16 **A.** I think they're both evaluated in their acquisition.

17 **Q.** Well, but it may be the case that an asset has such
18 significant strategic value that it may outweigh the economic
19 value; right?

20 **A.** In my experience, we would be encouraged to find the
21 results of that strategic value in an economic model that we
22 would be able to present.

23 **Q.** Okay. Well, I think we discussed that those are two
24 different things, the economic and the strategic; right?

25 **A.** They are.

1 Q. They don't always -- there's no mathematical necessarily
2 equivalence between them; right?

3 A. The strategic rationale that we use is to look at a -- the
4 opportunity relative to the company strategy and in our case
5 the gaming strategy. So how does any opportunity relate to the
6 strategy that we're on; and then the financials analysis, the
7 final go/no go that you talked about with Jamie is the
8 financial implications of us acquiring an asset.

9 Q. Okay. And the strategic value can differ from the
10 economic value? They're two components?

11 A. There isn't a value on the strategic. It's a strategic
12 analysis. So it's more of a commentary on how this asset fits
13 into the strategy that we have.

14 So it -- there isn't a numeric number that is the output
15 of the strategic value. So there's no value-to-value
16 comparison between the two documents.

17 Q. Okay. Let's take a quick look, sir. I want to talk to
18 you about -- more about some exclusives.

19 Can you turn in your binder -- this is the document
20 binder -- to PX1898, please?

21 Now, we've heard some talk here in the case that you've
22 been present for about Minecraft. This is a chat -- PX1898 is
23 a chat between you and a Mr. -- I assume it's a Mr. Nichols or
24 Ms. Nichols of Microsoft?

25 A. It's Mr. Nichols.

1 Q. I see Mike Nichols, okay.

2 A. Yes.

3 Q. And this is a chat that you had in 2019 with Mr. Nichols;
4 right?

5 A. It is.

6 MR. WEINGARTEN: Move to admit PX1898, please,
7 Your Honor.

8 THE COURT: Admitted.

9 (Trial Exhibit 1898 received in evidence.)

10 BY MR. WEINGARTEN:

11 Q. And you -- Mr. Nichols writes to you (as read):

12 "I'm of the mind that Dungeon ought to be Xbox and PC
13 only" --

14 Dungeons is a Minecraft game?

15 A. Minecraft Dungeons, yes.

16 Q. And he says (as read):

17 -- "i.e., where you can buy Game Pass, and we should
18 hold on Nintendo and PlayStation. I was not aware of
19 that part of the plan, and will talk to the team about
20 it but wanted you to know."

21 And you wrote "I agree." You wrote that?

22 A. I wrote "I agree" and the game ended up shipping on all
23 the platforms listed there.

24 Q. You agreed at that point in time that Microsoft should
25 hold on Nintendo and PlayStation; right?

1 **A.** I agreed in a chat with Mike Nichols. We ended up
2 shipping Minecraft Dungeons on all platforms.

3 **Q.** Let's take a look at another one. Can you look, please,
4 at PX1895?

5 **A.** (Witness examines document.)

6 **Q.** This is from 2020 now. The previous one was 2019. This
7 is a 2020 e-mail. I will wait for you to get there.

8 **A.** I'm there.

9 **Q.** Okay. PX1895 is an e-mail between you and Mr. Booty and
10 Ms. Bond. Do you see that?

11 **A.** I do.

12 **Q.** Okay. And it was -- this is from March 31st, 2020. Do
13 you see that?

14 **A.** I do.

15 **MR. WEINGARTEN:** Move to admit PX1895, please.

16 **THE COURT:** Admitted.

17 (Trial Exhibit 1895 received in evidence.)

18 **BY MR. WEINGARTEN:**

19 **Q.** Now, I can't read it out loud, but let's start with the
20 second paragraph. Do you see where it says "To me"?

21 **A.** I do.

22 **Q.** And you were aware of an arrangement -- I don't think this
23 part's confidential -- an arrangement with Sony to pay
24 Activision -- to give Activision some timed exclusivity with
25 Call of Duty on PlayStation 4?

1 **A.** Yeah. It's a practice that's still in place today.

2 **Q.** Okay. So the game gets out earlier on PlayStation 4 and
3 only comes to an Xbox later?

4 **A.** The advantage is that PlayStation customers get with Call
5 of Duty today are different than that, but there are still
6 advantages that Sony pays for.

7 **Q.** Right. And at the time of this e-mail, it was your
8 understanding that Sony was paying Activision to get Call of
9 Duty on PlayStation 4 earlier than it would come to Xbox?

10 **A.** Yes.

11 **Q.** Okay. And then you have a comment in that contrasting
12 that with something you're doing with Minecraft; right?

13 **A.** That's right.

14 **Q.** Okay. And can you remind the Court, please, what day and
15 date means? When you say that last clause, what does that mean
16 when something is day and date?

17 **A.** I don't see the clause "day and date," but when we talk
18 about day and date, it's the day a game ships.

19 **Q.** So --

20 **THE COURT:** The same day, Xbox and PlayStation?

21 **THE WITNESS:** Yes.

22 **BY MR. WEINGARTEN:**

23 **Q.** And so you're contrasting what Sony is doing with what
24 you're doing.

25 And the next paragraph you talk about a particular

1 strength that you believe Microsoft has, and you have some
2 regrets about the limitations of that strength; right?

3 A. I'm talking about how we're using our content.

4 Q. Okay. Those are the words you wrote there. I can't read
5 them, but those are your words; right?

6 A. The word "regret" there is reflecting on our overall
7 content strength.

8 Q. Right. It's limited only to that one title; right?

9 A. Yes.

10 Q. Okay. And you also think your content strength has to be
11 that thing that you're saying in the rest of that sentence;
12 right? The part that's before to us, that's what you want your
13 content strength to be; right?

14 A. Our content has to be a strength for our strategy and our
15 platform, yes.

16 Q. Okay. And it can't just be about -- and then you have
17 some other language there; right?

18 A. Yes.

19 Q. You believed that when you wrote that; right?

20 A. In 2020, yes.

21 Q. Yeah. So it can't just be about maximizing and then
22 there's that word there?

23 A. Yes.

24 Q. That means putting content on other platforms; right?

25 A. Yes.

1 Q. Okay. It can't be just about maximizing that, and so you
2 need -- and when you say "us," you mean Microsoft Gaming;
3 right?

4 A. "Us" would be Micro -- Xbox.

5 Q. Okay. "To find ways," and then that's what you want them
6 to find ways to do; right?

7 A. We have to find ways to use our content.

8 Q. And that's one of the things you wanted to do with the
9 content in 2020; right?

10 A. Well, you say we wanted to, but it's not what we did.

11 Q. Well, your directive to Mr. Booty, who runs first-party
12 studios, and Ms. Bond, who also had a senior role, was "I need
13 us to find ways to," and that's what you wanted them to find
14 ways to do; right?

15 A. It was a discussion between the three of us which led to
16 us shipping -- in this case continuing to ship Minecraft on all
17 platforms on the same day.

18 Q. Well, let's talk about that.

19 Minecraft -- strike that.

20 Microsoft has not optimized Minecraft to be played on
21 PlayStation 5; correct?

22 A. We have not yet optimized Minecraft, the core game, for
23 PlayStation 5.

24 Q. Actually instead if a PlayStation 5 gamer wants to play
25 Minecraft, they have to play the PlayStation 4 version; right?

1 **A.** Sony was reluctant to send us development kits for the
2 PlayStation 5 at the same time they were sending development
3 kits to other developers, which put our game at a disadvantage
4 relative to other PlayStation games that were launching, which
5 put us behind in our development of Minecraft on PlayStation 5.

6 **Q.** When did that happen when those developer kits didn't show
7 up?

8 **A.** I don't have an exact date in my head.

9 **Q.** PlayStation 5 launched in 2020 also; right?

10 **A.** Yes.

11 **Q.** So it's been three years; right?

12 **A.** The launch of a -- of the PlayStation and our content not
13 being held at a disadvantage by the platform holder by
14 withholding development kits from us and not from the
15 competitive content creators is a pretty significant -- shows a
16 pretty significant lack of support for us by the platform
17 holder, which hurts our ability to compete.

18 **Q.** So Sony held back the dev kits and you fought back by not
19 giving them the optimized Minecraft even when you got the dev
20 kits; right?

21 **A.** All we did with Minecraft was looked at the -- how we
22 maximize the success of Minecraft. There is a version of
23 Minecraft that runs on the PlayStation 5. The customers who
24 buy a PlayStation 5 get to use the version they had on their
25 PlayStation 4 so we don't charge them to buy a new version of

1 Minecraft on the new platform.

2 They -- and then with Minecraft, which I know you're aware
3 is a very big product shipping on 20-plus platforms, we have to
4 be very diligent in our use of the resources on Minecraft to
5 make sure that we're doing the best thing for the Minecraft
6 community.

7 **Q.** I appreciate everything you just said, but it doesn't
8 change the fact that the version of Minecraft that a
9 PlayStation 5 user gets to use is from a PlayStation 4; right?
10 It's a PlayStation 4 version; right?

11 **A.** The PlayStation 4 version runs on PlayStation 5.

12 **Q.** And the version that an Xbox user of Minecraft gets to
13 play on the Xbox consoles was optimized for those Xbox
14 consoles; right?

15 **A.** Yeah. Our team got the development kits from Xbox in time
16 to get that work done for the launch of Series X and S.

17 **Q.** That's -- definitely got them in time because Minecraft is
18 part of Microsoft. You're the same company; right?

19 **A.** I don't -- I think our -- I think that Sony could have
20 sent the development kits to Microsoft just as easily as they
21 could have sent to any other publisher of games.

22 **Q.** Oh, even putting that aside, though, Sony didn't send you
23 the kits and so you still haven't optimized Minecraft for
24 PlayStation 5?

25 **A.** We have used our Minecraft resources in places that we

1 think work best for what we're trying to do with Minecraft. We
2 continue to ship Minecraft Dungeons, as we talked about,
3 Minecraft Legends day and date inclusive of being native for
4 PlayStation 5, but we were put at a distinct disadvantage with
5 Minecraft on PlayStation 5's launch.

6 **MR. WEINGARTEN:** One more document and then if
7 Your Honor wants to take lunch, but I'm happy to keep going.
8 Oh, it's only 11:00.

9 **THE COURT:** It's too early for lunch.

10 **MR. WEINGARTEN:** Oh, thank you, Your Honor. Sorry
11 about that.

12 **THE COURT:** Not unlimited time.

13 **MR. WEINGARTEN:** Apologies.

14 **BY MR. WEINGARTEN:**

15 **Q.** Let's look at PX1897.

16 **MR. WEINGARTEN:** Move to admit PX1897; and if I didn't
17 move to admit -- strike that.

18 Move to admit PX1895, please, if I didn't.

19 **THE COURT:** Admitted.

20 (Trial Exhibit 1895 received in evidence.)

21 **MR. WEINGARTEN:** Thank you, Your Honor.

22 **BY MR. WEINGARTEN:**

23 **Q.** Let's look at PX1897. Now, this is even more recent in
24 time. The last e-mail was from 2020. Now we're up to 2021.

25 This is an e-mail from Mr. Stuart to you at the top;

1 right?

2 A. It is.

3 Q. And the middle e-mail, the next one down, is from you to
4 Mr. Leder, Ms. Braff, Mr. West, Mr. Stuart. Do you see that?

5 A. I do.

6 Q. And it's dated September 1, 2021?

7 A. It is.

8 Q. Okay.

9 MR. WEINGARTEN: Move to admit PX1897, please.

10 THE COURT: Admitted.

11 (Trial Exhibit 1897 received in evidence.)

12 BY MR. WEINGARTEN:

13 Q. Look at the first paragraph that you wrote to those
14 leaders (as read):

15 "I'm fine with F76 and PS Now."

16 F76 is a Forza driving game?

17 A. No. It's Fallout 76.

18 Q. Sorry. So that's another game?

19 A. It's another game from Bethesda. They're part of the
20 ZeniMax acquisition.

21 Q. Ah, okay. So this is an e-mail to people, including
22 Mr. Leder, who is a ZeniMax leader; right?

23 A. That's correct.

24 Q. Okay. So you're telling Mr. Leder you're fine with the
25 F76 Bethesda game being in PS Now; right?

1 **A.** I am.

2 **Q.** And PS Now is PlayStation's version of Game Pass?

3 **A.** They have multiple tiers but, yes, for this conversation
4 let's assume it's part of...

5 **Q.** Okay. And then you wrote to Mr. Leder (as read):

6 "We have not allowed Minecraft to support PS Now as
7 we do see PS Now as competition to XGP and don't need to
8 support their financial position with PS Now, which would
9 just allow them to compete more effectively with XGP."

10 You wrote those words?

11 **A.** I did.

12 **Q.** Okay. And so Microsoft Gaming did not allow Minecraft to
13 support PlayStation subscription service because Gaming sees
14 PlayStation subscription as competitive to Game Pass and you
15 don't want to support them to compete more effectively; right?

16 **A.** The way the relationship would work is Sony would come
17 forward to us with an offer. PlayStation Now, it's not called
18 that anymore, but PlayStation Now is not something that a title
19 would -- or, let's say, their content subscription is not
20 something that a title elects to be part of.

21 There's a financial conversation between a content
22 creator, in this case us as the creators of Minecraft. I
23 don't -- I have not been aware of any financial offer that Sony
24 has made to us to have Minecraft included in their content
25 subscription, but we have supported their content subscription

1 with other titles inclusive of Fallout 76 as listed here.

2 **Q.** Not with Minecraft?

3 **A.** I don't -- I'm not aware of an offer that Sony had made to
4 us so it -- the way it reads makes it seem like it's our
5 elective to put a game into PlayStation's content subscription.
6 That's not true; that Sony is the acquirer of content for their
7 subscription, and I don't remember us declining an offer from
8 Sony to put Minecraft in their content subscription.

9 **Q.** So it's Sony's fault that Microsoft Gaming has not allowed
10 Minecraft to support PlayStation Now?

11 **A.** I don't remember an offer from Sony to include Minecraft
12 in PlayStation what I'll call Plus Now, which is their consent
13 subscription.

14 **Q.** Okay. Let's talk just briefly about Nintendo for a second
15 here.

16 I want to talk to you about Call of Duty and I want to
17 talk to you about Call of Duty in relation to the Switch.

18 Let's talk about Call of Duty and its relationship to the
19 Switch, please.

20 If Call of Duty launches on the Switch, it's not going to
21 look the same to a player as if that player were playing it on
22 an Xbox X; correct?

23 **A.** Our goal if we launch Call of Duty on the Switch is that
24 it would be an equal or better quality as other Switch games.

25 **Q.** Can you please turn in your deposition transcript to

1 page 188?

2 **A.** Is this the first deposition?

3 **Q.** It is --

4 **A.** The 7011?

5 **Q.** No. I believe it's the other one. It would say on the
6 cover page. I don't know the exact -- I don't know the number.
7 I apologize. It would say "Videotaped Deposition" on the cover
8 page instead of "Investigational Hearing."

9 **THE COURT:** 7028.

10 **MR. WEINGARTEN:** 70 -- thank you, Your Honor.

11 **THE WITNESS:** 28?

12 **THE COURT:** The first volume in there.

13 **THE WITNESS:** Oh, okay. Thank you.

14 (Witness examines document.) Sorry. What was the page
15 number again.

16 **BY MR. WEINGARTEN:**

17 **Q.** Yeah, I appreciate that.

18 It's little page 191 of the transcript. So in your
19 deposition transcript page 191 and it starts at line 16, and I
20 asked you (as read):

21 **"QUESTION:** Do you anticipate that Call of Duty, if it
22 launches on Switch, will look the same as it looks for a
23 player who plays that title on Xbox X?

24 **"ANSWER:** I think it will play as a great" --

25 **MS. WILKINSON:** Excuse me. This is redacted.

1 **MR. WEINGARTEN:** Oh. I apologize.

2 **THE COURT:** Well, this seems fine.

3 **MS. WILKINSON:** It's in response and explains what he
4 said so --

5 **MR. WEINGARTEN:** Okay.

6 **MS. WILKINSON:** -- this portion is fine.

7 **MR. WEINGARTEN:** I'm sorry. I did not know that. I
8 don't think we received redacted transcripts from you guys.

9 **THE COURT:** It's okay. I don't think it is
10 confidential. Go ahead.

11 **MR. WEINGARTEN:** Okay.

12 **BY MR. WEINGARTEN:**

13 **Q.** So let's start again. Page 191, question on line 16 (as
14 read):

15 "Do you anticipate that Call of Duty, if it launches
16 on Switch, will look the same as it looks for a player who
17 plays that title on Xbox X?"

18 And your answer (as read):

19 **"ANSWER:** I think it will play as a great Switch game.

20 **"QUESTION:** My question -- respectfully it was not the
21 question. The question was: Do you anticipate that Call
22 of Duty, if it launches on Switch, will look the same to a
23 player as if that player were playing on Xbox X?

24 **"ANSWER:** It will not look the same."

25 That was your testimony?

1 A. It was.

2 Q. And it was truthful and accurate when you gave it?

3 A. Yes.

4 Q. You're aware that Microsoft and Nintendo have entered into
5 an agreement with respect to Call of Duty if this deal that
6 we're all here talking about is completed; right?

7 A. I am.

8 Q. You're not aware of anyone at Microsoft doing any kind of
9 economic analysis of entering into that agreement, right, with
10 Nintendo?

11 A. You mean prior to the deal being done?

12 Q. Yeah.

13 A. No. We have experience shipping on Switch. We've shipped
14 games on the Switch before so we do have an understanding of
15 how our games can perform.

16 Q. Oh, I'm sorry. I was asking about the economics.

17 So you're not aware of anyone at Microsoft doing any
18 analysis of the economic effect of entering into an agreement
19 with Switch or Nintendo for Call of Duty; right?

20 A. No.

21 Q. Okay. And you're not aware of any analysis at Microsoft
22 about how entering into an agreement with Nintendo to bring
23 Call of Duty to Switch will affect Microsoft Gaming's profit
24 and loss?

25 A. Not directly.

1 Q. Okay. And you're not aware of any analysis that
2 Microsoft -- well, strike that.

3 You're not aware of any work at Microsoft to understand
4 the impact of the Nintendo agreement on Microsoft's valuation
5 of the Activision business; right?

6 A. Inclusive in the valuation as we've seen is a large
7 running the existing business inclusive of shipping the games
8 on console.

9 Q. Uh-huh.

10 A. Nintendo Switch is a console. So as I think about it, I
11 think about the expansion of console sales through the reach on
12 a new platform, but there isn't a specific analysis but we do
13 think it's additive to that first line item, which is to run
14 the existing business.

15 Q. Well, let me -- let me break that down a bit.

16 The model at Microsoft models Activision's existing
17 business; right?

18 A. Yes.

19 Q. The existing business of Activision does not ship Call of
20 Duty on Switch; right?

21 A. They have other games on Switch, but they do not ship Call
22 of Duty on Switch.

23 Q. Right. And so my question is: You're not aware of any
24 work at Microsoft one way or the other about the impact of
25 executing that agreement with Nintendo and how that affects

1 this model that Microsoft developed, the results of the model?

2 A. No.

3 Q. The answer to my question is correct; right? There's
4 no -- you're not aware of any such analysis?

5 A. Correct.

6 Q. Okay. Let's talk a little bit about ZeniMax, please.

7 Microsoft announced the acquisition of ZeniMax in roughly
8 September 2020?

9 A. That's correct.

10 Q. And Microsoft completed the acquisition in February or
11 March of 2021?

12 A. That's correct.

13 Q. Okay. When Microsoft completed the transaction, you did a
14 roundtable at Bethesda; right?

15 A. We did -- I think you're alluding to the press event we
16 did, the kind of open roundtable with viewers watching, yes.

17 Q. Okay. So you did an open press, I think it's even on
18 YouTube now, sort of "We're excited to have acquired ZeniMax"
19 speech or, you know, series of programming; right?

20 A. Yes.

21 Q. Okay. So you and other Microsoft executives could talk to
22 the public and the gamers about the deal?

23 A. And ZeniMax executives, yeah.

24 Q. Great.

25 So you clearly remember talking about that?

1 **A.** I do.

2 **Q.** And you remember that -- do you remember in the roundtable
3 you said that (as read):

4 "If you're an Xbox customer, the thing I want you to
5 know is this about delivering great exclusive games for
6 you that ship on platforms where Game Pass exists and
7 that's our goal. That's why we're doing this"?

8 Do you remember that?

9 **A.** I do remember saying that.

10 **Q.** Okay. That's in -- and you said that around the time the
11 deal closed in March of 2021?

12 **A.** The roundtable was, yeah, right around of the deal's
13 closing time.

14 **Q.** Let's back up a minute.

15 After the deal was announced before it closed, you and
16 Mr. Stuart would talk about the upcoming ZeniMax deal, I'm
17 sure, as part of your duties; right?

18 **A.** We would discuss many things inclusive of the deal, yes.
19 Yeah.

20 **Q.** Do you remember in November of 2020 agreeing with
21 Mr. Stuart -- well, let's just show it to you.

22 Can you please turn in your binder to PX4377? 4377,
23 please.

24 **A.** (Witness examines document.) I found it.

25 **Q.** Okay. This is a chat between you and Mr. Stuart in

1 November 17, 2020?

2 **A.** Yes.

3 **MR. WEINGARTEN:** Move to admit PX4377, please.

4 **THE COURT:** Admitted.

5 (Trial Exhibit 4377 received in evidence.)

6 **BY MR. WEINGARTEN:**

7 **Q.** If you would, please, turn to page 002. I want to direct
8 your attention to the bottom -- one, two, three, four -- five,
9 lines of the chat between you and Mr. Stuart. Do you see that?

10 First, so there's a chat that starts at 2346 hours on the
11 17th of November and it starts with your words. Do you see
12 that?

13 **A.** I do see that.

14 **Q.** So starting from there to the bottom, take a look.

15 **A.** (Witness examines document.)

16 **Q.** And do you see Mr. Stuart says in the next chat there at
17 2348 hours wish -- something he wishes? Do you see that?

18 **A.** I do.

19 **Q.** Okay. And he expresses to you a wish about something you
20 could say or something you could do, and you wrote back that
21 you agreed; right? You said, "Yeah."

22 **A.** That I wish we could say that?

23 **Q.** Well, he says what he wishes you could do, and you said,
24 "Yeah. We just can't say."

25 **A.** Well, his comment is what he wishes we could say.

1 Q. Uh-huh.

2 A. So --

3 Q. Yeah. "We just can't say" was your response; right?

4 A. Yeah, because it wasn't true.

5 Q. Oh. That's your response, is that it wasn't true?

6 A. Right.

7 Q. Okay. Let's take a look at February 2021 again.

8 You don't remember a meeting with ZeniMax executives in
9 February 2021 about the acquisition and plans for ZeniMax?

10 A. I don't remember a specific meeting, but I meet with them
11 often.

12 Q. Well, you don't recall talking about exclusivity with
13 anyone at ZeniMax in February 2021; right?

14 A. I talk to them about all topics. I don't remember a
15 specific exclusivity conversation in February of 2021.

16 Q. Okay. And there were lots of meetings, as you said, with
17 ZeniMax executives as you guys are getting ready for the close
18 of the deal and even in the immediate aftermath of closing the
19 deal; right?

20 A. Continuing until today, yes.

21 Q. Right. But you don't remember attending any meetings in
22 February or March of 2021 with the ZeniMax leadership; right?

23 A. Not specifically.

24 Q. Okay. And you don't remember, if you don't remember the
25 meetings, whether exclusivity was talked about at any of those

1 meetings; right?

2 **A.** Not specifically, no, I don't.

3 **Q.** Okay. Let's look at PX1850, please.

4 **MR. WEINGARTEN:** I have this as not redacted. I want
5 to make sure there's no confidentiality. 1850.

6 **MS. WILKINSON:** Give me a moment.

7 **MR. WEINGARTEN:** Please.

8 (Pause in proceedings.)

9 **MS. WILKINSON:** Correct.

10 **BY MR. WEINGARTEN:**

11 **Q.** So PX1850 is an e-mail from Ms. Braff to you and Matt
12 Booty, and it's dated February of 2021; right?

13 **A.** It is.

14 **Q.** Okay.

15 **MR. WEINGARTEN:** Move admit PX1850, please.

16 **THE COURT:** Admitted.

17 (Trial Exhibit 1850 received in evidence.)

18 **BY MR. WEINGARTEN:**

19 **Q.** This e-mail was sent on February 10th and it's about a
20 prep session for a ZB meeting on the 16th. Do you see that?

21 **A.** I do.

22 **Q.** A "ZB" meeting is a ZeniMax Bethesda meeting?

23 **A.** It is.

24 **Q.** Okay. And Ms. Braff was responsible for the integration
25 of ZeniMax and Microsoft?

1 **A.** She was.

2 **Q.** Okay. She says (as read):

3 "Hi, Phil, Matt. When we meet up later today, it's a
4 quick touch base among us to get aligned out of our
5 Tuesday 16th planning session with ZM. Thinking we'll
6 focus on the big rocks with them."

7 Does "ZM" mean ZeniMax?

8 **A.** It does.

9 **Q.** And she says "Potential topics." And do you see the third
10 bullet there, "How we think about exclusivity"?

11 **A.** I do.

12 **Q.** Okay. And she says "Reminder, the attendees are" -- or
13 "The attendees for the 16th are" and she lists a whole bunch
14 of -- well, strike that -- she lists several ZeniMax and Xbox
15 executives, including you; right?

16 **A.** She does.

17 **Q.** You don't remember a meeting on the 16th or in February at
18 all about how we think about exclusivity?

19 **A.** I don't remember this specific meeting.

20 **Q.** Okay. Let's look at PX1851, please.

21 This is an e-mail from Mr. Stuart to Ms. Bond and you and
22 Mr. Booty and others; right?

23 **A.** It is.

24 **Q.** Also February of 2021?

25 **A.** Yes.

1 **MR. WEINGARTEN:** I move to admit PX1851, please.

2 **THE COURT:** Admitted.

3 (Trial Exhibit 1851 received in evidence.)

4 **BY MR. WEINGARTEN:**

5 **Q.** So you're getting ready here to figure out how to announce
6 the completion of the Bethesda transaction; right?

7 **A.** Yes.

8 **Q.** Okay. Look at page 002, please. That's an e-mail from
9 you on February 26th, 2021, and the subject says "ACP Bethesda
10 Announce"; right?

11 **A.** Yes.

12 **Q.** The importance is high; right?

13 **A.** Yes.

14 **Q.** You wrote to senior leaders, including Mr. Booty,
15 Mr. Stuart, Ms. Bond (as read):

16 "I want us to be bold in our announce of Bethesda
17 close regarding Bethesda titles focusing on Xbox. I know
18 there are financial implications, XGP implications, legal
19 implications. We film our announce next Tuesday and I
20 want us to get comfortable with saying, not exact wording,
21 the acquisition of Bethesda is about making Xbox stronger.
22 Our focus with Bethesda will be on the Xbox ecosystem."
23 Do you see that?

24 **A.** I do.

25 **Q.** So I appreciate you don't remember the meetings with

1 ZeniMax we talked about and your thinking on exclusivity, but
2 that's some of your thinking, at least, about Bethesda ZeniMax
3 when it closes -- the acquisition closes; right?

4 **A.** This is about my words to our community who's watching the
5 announce and why we did it, yes.

6 **Q.** Okay. Let's fast forward in time a little bit to
7 November, please, of 2021. So that's after the deal closes;
8 right?

9 Okay. Could you please turn your binder to PX1852?

10 **A.** (Witness examines document.)

11 **Q.** PX1852 is Ms. Braff writing an e-mail to you, Mr. Booty,
12 and now also Mr. Leder who was heading ZeniMax; right?

13 **A.** Yes.

14 **Q.** And she writes the e-mail, and it's dated November 4,
15 2021, and the subject is "Zeni MBR 11/10 Agenda." Do you see
16 that?

17 **A.** I do.

18 **Q.** And what's an MBR?

19 **A.** Monthly business review.

20 **Q.** And she says (as read):

21 "Hi. We have our MBR with the Zeni team next week.

22 Please note the agenda below."

23 And let's look at the agenda. The second item in the
24 agenda is "Phil's top of mind, 20 minutes," and the number one
25 item for your top of mind is "Guidance on exclusivity of future

1 titles." Do you see that?

2 A. I do see that.

3 Q. Now, you don't remember this particular speaking slot to
4 talk about what was at the top of your mind; right?

5 A. I don't remember specifically what I said in November of
6 2021 at this meeting.

7 Q. You testified previously you don't have any understanding
8 of what "guidance on exclusivity of future titles" means;
9 right?

10 A. Those were words that Jill wrote.

11 Q. You don't remember sharing your guidance on exclusivity
12 with ZeniMax in November 2021; right?

13 A. I do not.

14 Q. And you don't remember talking with any other executives
15 about exclusivity and ZeniMax titles in the fall of 2021?

16 A. Not specifically in the fall of 2021.

17 Q. Okay. But outside of the fall of 2021, the topic of
18 exclusivity of ZeniMax titles has been a topic of conversation
19 among you and other Xbox executives; right?

20 A. In running the platform business, the Xbox business, the
21 topic of exclusivity -- do you need to admit that one?

22 Q. Go ahead.

23 A. All right.

24 -- the topic of exclusivity is something we generally have
25 to talk about. All -- the Nintendo Switch, the PlayStation,

1 they both have significantly higher number of exclusive games
2 on their platform than Xbox does. It's talked about as a
3 weakness of our platform when people are making a decision
4 between the three platforms and what -- which ones they're
5 going to buy.

6 **Q.** So you don't remember in November of 2021 talking with
7 other executives about exclusivity and ZeniMax; but outside of
8 that timeframe, you do remember that you had some conversations
9 about exclusivity and ZeniMax titles?

10 **A.** Exclusivity in the console business is a topic
11 continuously inclusive of talking about ZeniMax titles.

12 **Q.** Some of those conversations were about whether a Zeni
13 game -- strike that.

14 But you don't remember any other conversations or any
15 other details about conversations with Microsoft executives
16 about ZeniMax titles and exclusivity?

17 **A.** There have been so many discussions in general about
18 exclusivity of titles on Xbox, I don't remember one specific in
19 fall of 2021; but exclusivity among console titles is just a
20 general topic in the console business so it is a constant
21 conversation when you run the Xbox business.

22 **Q.** You don't remember any conversations with Mr. Leder about
23 taking ZeniMax titles exclusive?

24 **A.** I've had many conversations with Jamie Leder about his
25 titles at ZeniMax and what platforms they ship on.

1 **THE COURT:** Do you want to admit 1852?

2 **MR. WEINGARTEN:** Yes, please, Your Honor.

3 **THE COURT:** Admitted.

4 (Trial Exhibit 1852 received in evidence.)

5 **MR. WEINGARTEN:** I will improve one day.

6 **BY MR. WEINGARTEN:**

7 **Q.** Let's take a look at page 44 of your deposition, please.

8 Page 44, line 16, of the deposition.

9 **A.** (Witness examines document.) I'm on there.

10 **Q.** Okay. Question -- I told you you could put a document
11 aside, but the question was (as read):

12 "In fall of 2021 do you remember if you had
13 conversations with Jamie Leder about exclusivity of
14 ZeniMax titles?"

15 And your answer was (as read):

16 "Then I do not."

17 And the question was (as read):

18 "Do you remember telling Mr. Leder in the fall of
19 2021 that all ZeniMax content going forward would be
20 exclusive to Xbox and PC?"

21 And your answer was "I do not."

22 That was truthful and accurate testimony when you gave it?

23 **A.** It was.

24 **Q.** Okay. Do you remember talking with Mr. Leder about future
25 ZeniMax titles and that there would be a presumption about what

1 platforms ZeniMax titles would be available on?

2 **A.** In talking to Jamie about the development teams at ZeniMax
3 and trying to align on our production schedules, I wanted to
4 make it clear to the team that their games they're building
5 would at least be shipping on Xbox and PlayStation -- Xbox and
6 PC.

7 So I wanted to make -- so I had a discussion with Jamie
8 about ensuring that we were focused on at least supporting
9 those two platforms.

10 **Q.** So the presumption that was shared between you and
11 Mr. Leder was that ZeniMax titles would be available on PC,
12 Xbox console, and xCloud; right?

13 **A.** Yes.

14 **Q.** But you just don't remember if you talked to Mr. Leder
15 about whether future ZeniMax titles would just be exclusive to
16 Xbox, PC, and xCloud; right?

17 **A.** When we announced the ZeniMax deal, I made the statement
18 that we would make the decision on exclusivity on a
19 case-by-case basis. So I know that the ZeniMax titles will at
20 least be shipping on Xbox and PC. And we would leave the
21 decisions that we would make for other platforms to a later
22 date as we had kind of more clarity on our relationship with
23 those platforms.

24 **Q.** So you have an understanding, as the head of Gaming at
25 Microsoft, of what platforms ZeniMax games are going to ship

1 on; right?

2 **A.** What I would say is in running our business, I understand
3 that the games that ZeniMax is building, absent the mobile
4 games, ZeniMax also launches some mobile games, but that there
5 are -- their core games would be launching on PC and Xbox.

6 **Q.** I guess my question was -- again, I'm sorry for being
7 inartful -- my question was: You have an understanding in your
8 head of what platforms ZeniMax games will ship on; right?

9 **A.** I know that at least they will ship on Xbox and PC, and I
10 think the other -- the platforms that we choose to support with
11 our content would be on a case-by-case basis, which is what --
12 the statement I've made publicly and what we've adhered to.

13 **Q.** Well, if that's your general understanding, did you
14 express that to Mr. Leder?

15 **A.** When you're asking me about the dates, you keep circling
16 in on the fall of 2021. So I just want to make sure. I don't
17 know if I said that in the winter of 2022.

18 In general, the first-party teams, both Xbox Game Studios
19 and ZeniMax, understand that the games they're going to build
20 will be shipping on Xbox and PC and other platforms we would
21 decide in most cases at a later date.

22 **Q.** Can you please turn in your deposition transcript to
23 page 51 of the deposition?

24 **A.** (Witness examines document.) I'm on it.

25 **Q.** Please look at line 14. The question on page 51, line 14

1 was (as read):

2 "And do you recall a general discussion on that point
3 with Mr. Leder?"

4 And your answer was (as read):

5 **"ANSWER:** In general, I have an understanding of what
6 platforms the games will ship on."

7 And then I asked a bad question and hopefully got better
8 (as read):

9 "Did you express that general understanding to
10 Mr. Leder?"

11 **"ANSWER:** No."

12 So you had an understanding -- that testimony was truthful
13 and accurate when you gave it; right?

14 **A.** No, I would say that's an inaccurate statement. I would
15 say Jamie understands that the games that ZeniMax is building
16 in line with the conversation we just had will be shipping on
17 Xbox and PC.

18 **Q.** Well, so you're saying that this sworn testimony was
19 incorrect when you gave it?

20 **A.** I think I might have, in the context of the flow of the
21 conversation here, been in a different space. I wasn't trying
22 to mislead anybody.

23 I'm saying that the content that we build at Xbox, we've
24 made public statements about that content being on Xbox and PC;
25 and the studios in general understand that the content that we

1 wield, absent mobile content, will be available at least on
2 those two platforms, and that's the public statement we've made
3 to our fans.

4 **Q.** Well, and I'll -- you've had many conversations with
5 Mr. Leder about Microsoft's titles being on Sony's platform?

6 **A.** I wouldn't say I've had many conversations on that topic,
7 but we have had conversations on that topic.

8 **Q.** Okay. But you don't recall any conversation in which you
9 talked with Mr. Leder about a plan that ZeniMax titles would
10 launch day-date on the Xbox platforms but not Sony?

11 **A.** As I said, we make the decision on a case-by-case basis.
12 There are games that we have shipped from ZeniMax on
13 PlayStation only and not day and date on Xbox. There have been
14 games that we have shipped on Xbox day and date and not on
15 PlayStation, and we've done releases on day and date on both
16 Xbox and PlayStation.

17 So in general, Jamie running ZeniMax and me as his
18 manager, we would have discussions about his content and what
19 platforms they would show up on.

20 **Q.** My question was just: Did you ever talk to Mr. Leder
21 about a plan that ZeniMax titles would launch on day one on the
22 Xbox platforms but not Sony?

23 **A.** There are titles that we have from ZeniMax that ship day
24 one on Xbox and PC and not Sony, so I would obviously have had
25 discussions with him on those titles.

1 Q. Okay. You don't recall a specific conversation?

2 A. I think more accurately I recall like a hundred
3 conversations on this topic and many other topics in running
4 the business, but not any specific conversation.

5 Q. Okay. Let's talk about some of the examples you just
6 gave.

7 So Ghostwire launched after Microsoft acquired ZeniMax,
8 but it's a ZeniMax title; right?

9 A. It did.

10 Q. And that launched exclusive on Sony; right?

11 A. And PC, yes.

12 Q. And ZeniMax had a preexisting contract to launch
13 exclusively on Sony and PC; right?

14 A. I would say it differently. I would say Sony had paid
15 ZeniMax to not ship on Xbox.

16 Q. That was a contractual obligation?

17 A. They paid them through a contract, yes.

18 Q. Ghostwire shipping exclusively on Sony and PC was due to a
19 contractual obligation; correct?

20 A. Through a payment from Sony to skip Xbox.

21 Q. Same thing for Deathloop?

22 A. Deathloop was also paid to skip Xbox.

23 Q. Redfall, no payment from Sony; right?

24 A. No.

25 Q. Okay. No contract obligation to ship on PC and Sony?

1 **A.** No.

2 **Q.** Redfall skipped PlayStation 5 when it launched; right?

3 **A.** Redfall shipped on Xbox and PC and not PlayStation.

4 **Q.** Starfield, no contract requiring launch on Sony; right?

5 **A.** We had adhered to every contract that we've had in place
6 on content when we've acquired it. So for Ghostwire and
7 Deathloop, as you said, we had a contract and we adhered to
8 that contract similar to what I expect to do with Call of Duty
9 on Switch. And when those games launched, there was no
10 contract with Sony to launch those games on the platform on
11 PlayStation, and they did not.

12 **Q.** Okay. Elder Scrolls 6 is a ZeniMax game; right?

13 **A.** It is not an Elder Scrolls -- it is not a ZeniMax game
14 yet. It's many years away. But it's a game that we've
15 announced that we would begin working on.

16 **Q.** The public announcement also said that there was a plan to
17 not launch that game on PlayStation 5; right?

18 **A.** I think we've been a little unclear on what platforms it's
19 launched on given how far out the game is. It's -- it's
20 difficult for us right now to nail down exactly what platforms
21 that game would be available on.

22 **Q.** I see. So in the case of Redfall, skipped PlayStation;
23 right?

24 **A.** Redfall did not ship on PlayStation.

25 **Q.** In the case of Starfield, skipped PlayStation; right?

1 **A.** Starfield hasn't launched yet.

2 **Q.** When it does, it will skip PlayStation?

3 **A.** We do not have plan for a PlayStation game, yes.

4 **Q.** Elder Scrolls 6, many moons away but no plan yet to launch
5 that on PlayStation; right?

6 **A.** As I said, with Elder Scrolls 6, it's so far out, it's
7 hard to understand what the platforms will even be at this
8 point. It's the same team that's finishing Starfield, which
9 comes out this September. So we're talking about a game that's
10 likely five-plus years away.

11 **Q.** You haven't committed an announcement publicly that it
12 would launch on Sony; right?

13 **A.** I have not.

14 **Q.** You're the decision maker with respect to all of those
15 titles we've just been discussing?

16 **A.** I am.

17 **Q.** And I think on Elder Scrolls 6 you said you've been
18 ambiguous or it hasn't been publicly clear what platforms it
19 will launch on; is that right?

20 **A.** That's what's in my head. I don't have every piece of PR
21 that we've talked about. As I stated, the game's so far away,
22 that I think making a definitive statement on what platforms
23 it's going to launch on at this point, inclusive, frankly, of
24 our own platforms, would be getting ahead of ourselves a bit.

25 **Q.** Okay. With that in mind, can you please look at your

1 investigational hearing transcript page PX -- strike that.

2 It's PX7012-009 and it's transcript page 426.

3 **A.** Sorry. Was this 7012?

4 **Q.** Yes, sir.

5 **A.** You said 4 --

6 **Q.** Little page 426. PX page is 009.

7 **A.** (Witness examines document.) Got it.

8 **Q.** Okay. Line 7 (as read):

9 **"QUESTION:** Have you talked to anyone about whether

10 Elder Scrolls 6 will skip PlayStation?

11 **"ANSWER:** I have made public estimates that

12 Elder Scrolls 6 will be exclusive to Xbox and PC."

13 Was that testimony truthful and accurate when you gave it.

14 **A.** I don't -- I don't know. I don't know that I've made a
15 public statement saying that.

16 **Q.** So you don't know whether that was accurate testimony at
17 that time?

18 **A.** When I said it, I believed it was; but if you ask me
19 today, I can't recall a public statement where I've said that.

20 **Q.** Okay. Let's talk about Indiana Jones.

21 Disney owns the intellectual property for Indiana Jones?

22 **A.** Disney does, yes.

23 **Q.** ZeniMax was developing an Indiana Jones game for multiple
24 platforms when Microsoft acquired ZeniMax; right?

25 **A.** They were.

1 Q. And then you approved paying Disney to amend its deal so
2 that the Indiana Jones game would be exclusive to Xbox, PC, and
3 Game Pass; right?

4 A. We acquired ZeniMax. They had the Indiana Jones game in
5 development. It did not include -- including the game in
6 Game Pass and it include launching the game on multiple
7 platforms.

8 So my request for the team was to go back and open up a
9 discussion with Disney first about ensuring we can ship on
10 PlayStation -- ship on Game Pass, and then a discussion about
11 what platforms we would launch in.

12 One of Sony's biggest exclusive games is Spiderman, also a
13 Disney-owned IP that doesn't ship on Xbox; and in competing
14 effectively with them, I think it's important that we have kind
15 of outside gaming known IP that is part of our portfolio on our
16 platform.

17 Q. Could you please turn in your binder to PX4725?

18 A. This is in the document?

19 Q. Yes. I'm sorry. It's in the document binder, please.

20 A. (Witness examines document.)

21 Q. Do you have PX4725 in front of you, sir?

22 A. I do.

23 Q. It's an e-mail chain. I know you're not on the top of it,
24 but you are at the bottom. You see two up from the bottom it's
25 from you dated September 29th, 2022, 10:55 a.m.?

1 **A.** Yes.

2 **Q.** It's from Jamie Lawver -- or strike that.

3 It's from you to Jamie Lawver and others at Microsoft;
4 right?

5 **A.** It's in response to Jamie Lawver, yes.

6 **MR. WEINGARTEN:** Move to admit PX4725, please.

7 **THE COURT:** It's admitted.

8 (Trial Exhibit 4725 received in evidence.)

9 **BY MR. WEINGARTEN:**

10 **Q.** Let's -- you're approving something there. You say
11 "approved"; right?

12 **A.** I do.

13 **Q.** Let's go to the next e-mail down that you're approving.
14 That's on page 2. Take a look at that e-mail. That one's from
15 Ms. Lawver to you, and she says "Hi, Phil." And then take a
16 look at what she asks for you to approve. Do you see that
17 first sentence?

18 **A.** I do.

19 **Q.** Okay. And that's what you approved; right? What she
20 asked for in the first sentence; right?

21 **A.** Yes.

22 **Q.** Then let's look at that table. You see the total number
23 there?

24 **A.** I do.

25 **Q.** That's the total that you approved; right?

1 **A.** It is.

2 **Q.** Okay. If you had the financial ability to pay for
3 exclusivity as needed or as you thought was needed, the only
4 thing technically keeping you from paying a developer in the
5 future to skip or deprecate the experience of a game on arrival
6 is your word; right?

7 **A.** Can you restate it?

8 **Q.** Yeah. Do you remember testifying that the only --
9 recognizing that if you were going -- had the financial ability
10 to pay for a developer to skip or make its content worse on
11 arrival, you wouldn't do that, but the only way -- the only
12 guarantee that you wouldn't do that is your word; right?

13 **A.** I'm still kind of confused by the question. I apologize.

14 **Q.** No. It's my fault.

15 **THE COURT:** Can you separate it out between skip
16 and --

17 **MR. WEINGARTEN:** Yeah, I can try that.

18 **THE COURT:** Because I think those are two very
19 different things.

20 **MR. WEINGARTEN:** Okay. Let me get to the testimony
21 and see how we can do it.

22 (Pause in proceedings.)

23 **BY MR. WEINGARTEN:**

24 **Q.** Okay. If you had the financial ability to pay a developer
25 to skip PlayStation whenever you wanted, would you do it?

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1 **A.** The developer's an Xbox Game Studios game or a third-party
2 game?

3 **Q.** Either.

4 **A.** I would not.

5 **Q.** Okay. And if you had the financial ability to pay a
6 developer to deprecate the content, make it worse, on a
7 PlayStation, would you do it?

8 **A.** Not in practice, no. It's not something I think I would
9 do.

10 **Q.** And why? What do we have to base that on that you
11 wouldn't do that?

12 **A.** I think probably the best thing are the actions that we've
13 taken as a publisher.

14 **MR. WEINGARTEN:** Nothing further, Your Honor, at this
15 time.

16 **THE COURT:** All right. Do you want to start or do you
17 want to take an early lunch?

18 **MS. WILKINSON:** What would you like to do, Your Honor?

19 **THE COURT:** It's up to you.

20 **MS. WILKINSON:** I have a few things I --

21 **THE COURT:** All right. Why don't we start.

22 **CROSS-EXAMINATION**

23 **BY MS. WILKINSON:**

24 **Q.** Mr. Spencer, I want to start where you left off.

25 Would you ever purposely degrade a game that you're

1 putting on another platform?

2 **A.** For a game that we're building, the thought that we would
3 create a lower quality game on another platform, my view is it
4 diminishes our brand and our reputation, and it's not something
5 that I would do.

6 **Q.** So can you explain to Her Honor why it makes no sense
7 financially for you to do that, to put it on your own platform
8 as, you know, a higher quality and degrade it and put it on the
9 PlayStation -- let's use PlayStation as an example --

10 **A.** Yeah.

11 **Q.** -- the PlayStation console?

12 **A.** Developing big games today is very expensive. When you're
13 spending all of the development costs and making a decision to
14 launch in this case, say, on PlayStation, you're obviously
15 building into your return on the investment of building these
16 large games sales on the PlayStation platform to help recoup
17 and be profitable in running the business.

18 And given that PlayStation is significantly larger than
19 Xbox, building a high-quality game for Xbox and somehow
20 building a lower quality game on the largest market segment
21 doesn't make financial sense or, as I said, brand sense for us,
22 and we haven't done it.

23 **Q.** So if we use our movie analogy that you have taught me, if
24 you designed a movie for Omaha and you made it worse for New
25 York City, that wouldn't make any economic sense; right?

1 **A.** Yeah. When you've built the entertainment property movie,
2 whatever it is, your -- the best return that you can get -- the
3 most profitable thing in our industry are massively hit games,
4 and what you do to keep those games at their peak of popularity
5 is to continue to deliver high-quality content to as many
6 customers as you can.

7 **Q.** And the --

8 **THE COURT:** Can I ask you about those as many
9 customers as you can? But you have games like Halo that aren't
10 on PlayStation 5.

11 **THE WITNESS:** That's right.

12 **THE COURT:** You could deliver it to way more customers
13 if it were?

14 **THE WITNESS:** Yes.

15 **THE COURT:** So can you reconcile that inconsistency?

16 **THE WITNESS:** Yeah, absolutely.

17 In the console space, all of the platforms have exclusive
18 games that don't launch on the competitive platforms. So for
19 us, we're at a deficit, a significant deficit, like orders of
20 magnitude, behind PlayStation and Nintendo on the hit quality
21 and number of exclusive games, and it's one of the decisions
22 people make when they're going into a store on what console to
23 go buy.

24 But in the case of, say, Minecraft, which is our largest
25 game by revenue, that game has reached a financial level of

1 success where it's -- it's a significant profit driver for us
2 given that it's shipping on all the platforms. So if you can
3 get a game that's at that level of hit and that level of
4 business, the size of the business, our job is to maintain and
5 grow that.

6 When you talk about other games that are only launching on
7 one platform or another, they're usually much smaller games.
8 In terms of scale, Halo is much smaller than Call of Duty, as
9 an example. Starfield is much smaller than Minecraft.
10 Starfield hasn't launched yet.

11 **THE COURT:** Well, you hope that it would be bigger;
12 right?

13 **THE WITNESS:** You do. And it's -- it's why in the
14 evolution of our strategy -- and I apologize if I'm going
15 long -- we used to just ship games on our Xbox. We didn't even
16 ship them on Windows when we day and date, when we launched;
17 and it was a few years ago that we made the decision that our
18 console games would launch on our console and PC on the same
19 date.

20 That's not something, say, that Sony does. Sony delays
21 the launch of their games on PC because they're trying to drive
22 people to buy a PlayStation.

23 And our strategy is very much: How do we find as many
24 players as we can with Xbox?

25 **THE COURT:** All right. Sorry.

1 **MS. WILKINSON:** No problem.

2 **BY MS. WILKINSON:**

3 **Q.** Let's also talk about the financial considerations you
4 have when you are responsible for the costs of developing that
5 game --

6 **A.** Yeah.

7 **Q.** -- versus a third-party game. Okay?

8 So let's talk about ZeniMax. Once you bought ZeniMax,
9 were you responsible for all the costs of developing whatever
10 new games they developed?

11 **A.** We are.

12 **Q.** When you used to contract with ZeniMax to put the games on
13 your platform, were you responsible for all those development
14 costs?

15 **A.** We were not.

16 **Q.** So once you are responsible for all those development
17 costs, do you different -- do you do a different kind of
18 financial analysis than you would when you're making an
19 agreement with a third party?

20 **A.** Yeah. There's a lot less risk for us in working with
21 third parties who are building games on our platform because
22 we're not funding the development.

23 We want them to be very successful on our platform, but we
24 do not have the same financial risk and we partner with them
25 differently than the games that we fund completely.

1 Q. When you're building a new game, is there a different
2 analysis on where you put it in terms of platforms versus
3 getting a game that already exists and is multiplatform?

4 A. For us building our own games?

5 Q. Versus when you're acquiring a multiplatform game, is
6 there a different calculation?

7 I think -- oh. Should I rephrase it?

8 A. No. I think I understand it.

9 If a game is in the market and it has customers on another
10 platform, in any entertainment industry, including gaming,
11 that's the most difficult thing for us to get, is a customer
12 who loves our product on a platform.

13 So if we were to acquire something that has found customer
14 love, users, business on another platform, we want to nurture
15 and grow that for the games that we're building. When we're
16 building a new game, which has no customers today, we're
17 usually thinking about how to maximize our creative capability
18 while minimizing our cost and production risk in a game.

19 So it's a different math when you're thinking about games
20 that you're building new versus maybe games that you would
21 acquire that have existing communities.

22 Q. Let's go to the game at issue, Call of Duty.

23 When you acquire Activision, are you going to maintain it
24 on PlayStation if Sony will agree or would you remove it from
25 the PlayStation?

1 **A.** We will keep Call of Duty on PlayStation if Sony will
2 allow us to do that, current versions, past versions that
3 players are playing and subsequent versions in development.

4 **Q.** Assume Sony would agree. Would you have any reason to,
5 nevertheless, pull it from their platform, not honor your
6 Nintendo contract, and keep it exclusive to Xbox?

7 **A.** No. The financials that Jamie walked through -- and I
8 appreciate her coming up here and doing that -- the size of
9 Call of Duty, the role it plays in the valuation of buying
10 Activision makes it both financially impossible for us to
11 figure out how we would recover from losing Call of Duty on its
12 largest console platform.

13 And as a business, we -- we have over 50 games in the
14 PlayStation digital store today. We are very familiar with
15 shipping games on PlayStation. We partner with them incredibly
16 well outside of the discussion on this deal.

17 So I would look to continue -- to expand really where Call
18 of Duty is. Continue to ship all future versions of Call of
19 Duty on PlayStation is my goal; and, as you said, also bring it
20 to the Nintendo Switch, and we have a contract to go do that.

21 **Q.** Today when you compare the number of gamers that play Call
22 of Duty on your platform to the Call of Duty players that play
23 on PlayStation, what's the relative comparison?

24 **A.** There's significantly more players on PlayStation than
25 there are Xboxes. As we know -- it keeps getting put up

1 there -- there are a lot more PlayStations than Xboxes in the
2 market and the game is very successful on both platforms. So
3 PlayStation is by far the largest.

4 **Q.** Last question before lunch.

5 **A.** Yeah.

6 **Q.** Since it already has an existing community, if you pulled
7 the game from PlayStation, do you anticipate or would you
8 anticipate any reaction from those customers? Or they're not
9 your customers I guess, but those players on PlayStation.

10 **A.** Yeah. I think as we've seen even in preparation for this,
11 that gamers are an active and vocal group. Us pulling Call of
12 Duty from PlayStation in my view would create irreparable harm
13 to the Xbox brand after me in so many public places, including
14 here, talking about and committing to us not pulling Call of
15 Duty from PlayStation.

16 **THE COURT:** You're testifying under oath.

17 **THE WITNESS:** Yes.

18 **THE COURT:** You're testifying under oath that you will
19 make future versions of Call of Duty available for the
20 PlayStation 5? You will invest whatever developer expenses you
21 need to do to do that? Of course Sony has to --

22 **THE WITNESS:** That's right.

23 **THE COURT:** -- let you do it, but you're testifying
24 under oath that you will do that?

25 **THE WITNESS:** Absolutely, and I would do it -- I

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1 would -- I'll raise my hand. I will do whatever it takes. We
2 are not -- we have no plan to pull Call of Duty from --

3 **THE COURT:** No, putting aside a plan.

4 **THE WITNESS:** I'm making the commitment standing here
5 that we will not pull Call of Duty, it is my testimony, from
6 PlayStation. And, as you said, Sony obviously has to allow us
7 to ship the game on their platform; but absent any of that, my
8 commitment is and my testimony is, to use that word, that we
9 will continue to ship Call of -- future versions of Call of
10 Duty on Sony's PlayStation platform.

11 **THE COURT:** Ready for lunch?

12 **MS. WILKINSON:** Yes, ma'am.

13 **THE COURT:** Are you done with your questions or you're
14 just ready for lunch?

15 **MS. WILKINSON:** No, that's perfect. Both actually.

16 **THE COURT:** Both? Well, then I actually --

17 **MS. WILKINSON:** Yes, you go right ahead, Your Honor.

18 **THE COURT:** I wanted to go back, if we could, to
19 Exhibit --

20 **MS. WILKINSON:** Oh, Your Honor, I do have plenty of
21 questions about the other exhibits.

22 **THE COURT:** Oh, you do have. I thought you were done
23 with your questions.

24 **MS. WILKINSON:** Oh, no. That would be nice.

25 **THE COURT:** Okay. Fine then let's take our lunch

PROCEEDINGS UNDER SEAL

1 break, and what I'd like to do is come back at -- so it will be
2 a 45-minute lunch break. We'll resume at 12:45, but I need all
3 the lawyers here and Ms. Bennett here at 12:30 to go over
4 Mr. Ryan. And so that will be closed session. Just so the
5 audience knows, we're going over confidentiality, so at 12:45
6 we can resume in public session.

7 (Luncheon recess was taken at 12:00 p.m.)

AFTERNOON SESSION**12:32 p.m.**

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9 (The following pages 369 through 389 were placed under
10 seal by Order of the Court:)

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14 (The following proceedings were heard in open court:)

15 **THE COURT:** Okay. We're going to resume with court.
16 We need quiet, please.

17 (Pause in proceedings.)

18 **THE COURT:** Ms. Wilkinson, you may proceed.

19 **MS. WILKINSON:** Thank you, Your Honor.

20 Your Honor, I was just informed that the Zoom is not on.

21 **THE CLERK:** Now it's on.

22 **BY MS. WILKINSON:**

23 **Q.** Let's start this afternoon, Mr. Spencer, with just an
24 overview of how the industry has changed just in the last few
25 years.

1 You were shown many documents from 2019, 2021, '22, and
2 '23; right?

3 **A.** Yes.

4 **Q.** And have your views on how the industry is developing and
5 your place in the industry changed over that time?

6 **A.** It has, yeah.

7 **Q.** Would you call it a rather rapid change?

8 **A.** Yeah. The game industry is a place of rapid innovation
9 and business model and creative change.

10 **Q.** Okay. I want to start by looking at PX112 -- I mean
11 RX1125. It should be in the dark -- the black notebook.

12 **A.** Oh.

13 **Q.** Thank you.

14 **MR. WEINGARTEN:** I'm sorry. I don't believe I have
15 the RX notebook.

16 (Pause in proceedings.)

17 **THE COURT:** What number?

18 **MS. WILKINSON:** 1125, RX1125.

19 **BY MS. WILKINSON:**

20 **Q.** Just to put in context, Mr. Spencer, look at the first
21 page. Is this an e-mail transmitting some strategy review on
22 behalf of gaming?

23 **A.** Yes, it is.

24 **Q.** What is it dated?

25 **A.** April 21st, 2020.

1 Q. Let's start on page 003.

2 A. Yes.

3 Q. And you'll see there's some redactions, but go down to
4 1.3, "Industry Context." Do you see that?

5 A. I do.

6 Q. And that is not redacted.

7 MS. WILKINSON: Your Honor, we'd like to move in a
8 redacted copy -- well, a full copy for you, RX1125.

9 THE COURT: Admitted.

10 (Trial Exhibit 1125 received in evidence.)

11 MS. WILKINSON: And could we show, Roger -- oh, you
12 got it. Okay. I just can't see it. There we go.

13 BY MS. WILKINSON:

14 Q. And this is talking about 2019; correct?

15 A. It is.

16 Q. What was the total gaming industry revenue of estimate for
17 that time period?

18 A. \$182 billion.

19 Q. All right. How does that compare to movies and music?

20 A. It's larger than movies and music.

21 Q. Turn to the next page, if you could to, Figure Number 2,
22 and I want you to focus on the state of mobile console and PC
23 client.

24 Are those numbers accurate, to the best of your knowledge,
25 for 2019?

1 **A.** They are.

2 **Q.** And how -- they're kind of split between mobile and
3 console. How has that changed from when you first joined Xbox
4 to 2019?

5 **A.** Mobile has grown to become the number one gaming platform
6 on the planet, both in terms of users and monetization revenue.

7 **Q.** And if we put a pie chart together and we put mobile,
8 console, and PC client, has mobile been gaining share within
9 that world of revenues?

10 **A.** Yes. It's growing -- it's growing the fastest and
11 continues to really be the only segment that grows with any
12 consistent rate.

13 **Q.** In 2019 seeing these revenue numbers, did you have a
14 strategy about where you wanted to go with Xbox gaming?

15 **A.** It was -- yes, we did.

16 **Q.** What was it?

17 **A.** It was very imperative to us being that if we were going
18 to remain and grow our relevance in the gaming market, we were
19 going to have to find customers on mobile platforms for Xbox.

20 **Q.** Did you discuss that with your Gaming leadership team?

21 **A.** Yes. It's been a constant topic with the board of
22 Microsoft, the senior leadership team at Microsoft, and our
23 Gaming leadership team.

24 **Q.** Give the Court an example of some of the things -- some of
25 the things you tried to do to gain access to those mobile

1 customers.

2 **A.** So over the years as mobile's grown to be a bigger part of
3 gaming, there's really been two approaches for us. One is
4 we've built more native games on mobile, found very limited
5 success in that space outside of the Minecraft title.

6 And we had a strategy that we've talked about here on
7 streaming console games to mobile devices with the hope that
8 users on mobile phones would find access to console games to be
9 an interesting -- an interesting business for them and a place
10 that they wanted to play games.

11 **Q.** Can you explain that a little bit more? You had a cloud
12 streaming service; right?

13 **A.** Yes.

14 **Q.** You still have one?

15 **A.** We still do.

16 **Q.** And what was -- what was your strategic reason for having
17 that cloud streaming business?

18 **A.** We built xCloud, which is the kind of code name for our
19 cloud streaming business, knowing that on Xbox we have many
20 games that run on our console platform.

21 And there are many users around the world that have phones
22 that aren't able to play those games nor will they be because
23 those games were built for a console over the years.

24 So our strategy was to put consoles in our data centers
25 and stream the game play from those consoles to a mobile phone.

1 So that if somebody wanted to play Halo on a mobile phone or
2 they wanted to play our driving games on a mobile phone, that
3 they would have access to those through streaming and that we
4 would find a significant number of customers given the
5 installed base of people playing games on mobile phones is the
6 largest segment of people playing.

7 **Q.** So you're taking the native version on a console and
8 streaming it to a phone?

9 **A.** Yeah. Literally in an Azure data center, so big building,
10 cement, there's a rack of Xbox motherboards. As Sarah was
11 explaining, it doesn't quite look like that. It's just the
12 silicon part of the console that is running the game when
13 somebody launches it on xCloud.

14 On their phone, the person launches the game and when they
15 give it input, so say click "A" on the screen, that click is
16 sent via the internet to the data center which clicks "A" on
17 the game sitting in the data center. And then the bits that
18 are actually being displayed on the screen are also streamed
19 down to the phone giving you a round-trip ability to play.
20 This is what xCloud is today.

21 **Q.** In 2019 were you hoping that would move a lot of -- or at
22 least expand your customer base over on the mobile side?

23 **A.** Yeah. My real hope was the fact that we'd had at that
24 point nearly 20 years of Xbox games built on our console
25 platform, that that would give us a unique offer to players on

1 phones. That you don't have to go buy a video game console to
2 play these games, that we could stream the game directly to the
3 phone, and we would unlock the billions of people or
4 1.8 billion I think people play on mobile phones today. That
5 was our hope.

6 **Q.** Mr. Spencer, how did that work out for you?

7 **A.** It turns out there are a lot of barriers to console games
8 being displayed on a phone screen. I'll start with a few of
9 them.

10 One that Sarah talked about is the latency. Latency is
11 the time difference between when you want something to happen
12 on the screen and when it actually happens.

13 So what I talked about before of pulling a trigger or
14 clicking a button, the speed of light, it takes time for that
15 action to go to the cloud and come back. So latency is clearly
16 one issue.

17 Another, I guess, fairly obvious issue are these games
18 were built for a television screen. So even things like the
19 font size as you take something that was built for a 40- or
20 50-inch screen and shrink it down to like a 6- or 7-inch
21 screen -- 6-inch screen on a big phone, it's very hard to see
22 even what's happening or read what's happening on the screen.

23 And the last thing, which is also obvious, is people play
24 console games with a controller, and the controller is --
25 whether it's the Switch or PlayStation or an Xbox, you have a

1 controller that has buttons and triggers. Your phone doesn't
2 have that.

3 So our xCloud software was trying to mimic a controller on
4 the touch screen of the phone, which turns out to be very
5 limiting to the experience that people have. And,
6 consequently, we didn't make much traction actually finding new
7 phone customers for Xbox.

8 **Q.** Take a look at RX10 --

9 **MS. WILKINSON:** Your Honor, I did move that in, yes,
10 1125.

11 **BY MS. WILKINSON:**

12 **Q.** Take a look at RX1093. Is that an e-mail chain which at
13 the top is from Catherine Gluckstein to you on February 21st,
14 2019?

15 **A.** Sorry. I want to make sure I'm on the right one. 1093?
16 Yes.

17 **MS. WILKINSON:** We move 1093 in.

18 **THE COURT:** Yes.

19 (Trial Exhibit 1093 received in evidence.)

20 **BY MS. WILKINSON:**

21 **Q.** Is this a discussion with some of your colleagues about
22 some of the issues you're trying to address in the mobile
23 market?

24 **A.** It is.

25 **Q.** Turn to page 4, please. Look at the top where you wrote

1 to Catherine and the subject is "xCloud Strategy and GDC."

2 **A.** Yes.

3 **Q.** What is GDC?

4 **A.** It's the Game Developers Conference, which is held here in
5 San Francisco every year in March.

6 **Q.** In the second paragraph, you say "First, we are exactly
7 like Polaroid." What did you mean by that?

8 **A.** Catherine, who went on to run our xCloud team, was making
9 a point that as digital photography came about, Polaroid had a
10 strategy that really hinged on their current strengths, which
11 was printing photos out, and it turns out that what phone
12 customers wanted was just the ability to capture digital images
13 directly on their phone.

14 So her -- if you read lower, you'll see that Catherine's
15 talking about the fact that Polaroid built a strategy based on
16 their strengths, not the market demands. And I'm -- I'm making
17 the point that xCloud is really a strategy built out of we have
18 console games, so let's try to stream them to phones, not
19 actually a strategy built out of what customers are asking for.
20 Mobile customers specifically.

21 **Q.** Did you contrast below when you said, "This is kind of
22 what Bobby K is trying to do at ATVI"?

23 **A.** Yeah. Bobby Kotick, who's the CEO of Activision, has done
24 a really good job on diversifying where Activision finds
25 customers. As we saw earlier, their biggest revenue stream

1 today is from mobile games. That was not true 15 years,
2 10 years ago. They're finding new customers for existing
3 franchises through things like Call of Duty mobile and new
4 things that they've -- they've acquired or built.

5 **Q.** When you get on a mobile phone and use Candy Crush, to
6 access the game do you have to pay anything?

7 **A.** Candy Crush is a free-to-play game.

8 **Q.** Go down to the fifth paragraph that says "Because" and go
9 halfway down where you say (as read):

10 "They also don't pay for any games. All the mobile
11 games are FTP."

12 Free to play; right?

13 **A.** Yes.

14 **Q.** (as read):

15 "So even the business model around our games that
16 mobile players don't want is wrong."

17 What do you mean by that?

18 **A.** As Mr. Weingarten and I were talking about, our goal with
19 Game Pass was to lower I'd say the entry price for somebody
20 getting into playing console games from \$70 to in the case of
21 console Game Pass \$10 a month thinking that as you're finding
22 more customers, that the business model needs to be more
23 flexible for a less core customer.

24 On phone, almost every game that somebody plays is free
25 and has a business model around transactions or time.

1 So not only was our content hard to see on the screen and
2 hard to control on a phone, the predominant business model for
3 games on the phone did not match the content base that we had
4 on Xbox.

5 **Q.** Did there come a time when you tried a different strategy
6 through acquisition?

7 **A.** Yeah. Every time we would -- yes. Every time we'd sit
8 down with the Microsoft Board or the senior leadership team,
9 while they might appreciate our strategy on console and PC, it
10 was pretty clear that if we did not have a strategy that found
11 success on mobile, our relevance in the market was going to
12 continue to shrink.

13 If you're on the two platforms that are not growing and
14 there's a third platform called mobile phones that are really
15 the sole source of video game growth over the last few years,
16 you are going to be less and less relevant as a platform. So
17 we started to look at acquisition as a strategy.

18 **Q.** Before the Activision opportunity came along, did you make
19 some significant steps toward acquiring a mobile gaming
20 company?

21 **A.** Yes. We had entered into some discussions, preliminary
22 discussions, with a company called Zynga, which was based here
23 in San Francisco. It ended up getting acquired by Take-Two,
24 which is one of the game publishers in the video game business,
25 but that was an opportunity that we spent quite a bit of time

1 on.

2 Q. Please take a look at RX1141.

3 MS. WILKINSON: We move into evidence.

4 THE COURT: 1141? 1093 you want admitted as well?

5 MS. WILKINSON: Yes, Your Honor.

6 (Trial Exhibits 1093 and 1141 received in evidence.)

7 BY MS. WILKINSON:

8 Q. This is a May 5th, 2021, with a deck attached; right?

9 A. Yes, it is.

10 Q. And the first page of the deck is titled what?

11 A. The "M & A Pipeline."

12 Q. And if you go to page 007, you have your strategy laid out
13 there; correct?

14 A. Yes.

15 Q. And you have a list of gaps. What do you mean by "gaps"?

16 A. Looking at the -- looking at the games that we currently
17 build in Xbox Game Studios, which is the XGS acronym, which is
18 our first-party organization, looking at what we have today
19 versus what we believe we need to have to be successful in the
20 broadest gaming market.

21 Q. And it included there under the first set of bullet points
22 is "Lack of mobile native content." It says (as read):

23 "Scarcity of relevant PC content and lack of mobile
24 native content."

25 A. I might be on the wrong page.

1 Q. Page 007 or page 5 of the deck.

2 THE COURT: 1141.

3 THE WITNESS: 1141. Sorry I'm not -- it is a true
4 statement. I just don't see it on the paper. Am I --

5 BY MS. WILKINSON:

6 Q. It's this page (indicating).

7 A. Oh, I can't read -- scarcity of relevant PC content, lack
8 of mobile native content, yes, it continues to be a gap in our
9 portfolio.

10 Q. Did Zynga have some significant native mobile content?

11 A. They do.

12 Q. And look at page 001 -- I mean 017.

13 A. Yes.

14 Q. Did your team do an analysis of potential targets?

15 A. We did.

16 Q. There are quite a few there, a thousand potential targets.
17 Why did you have them look at so many?

18 A. It was critical for us to find the right content partners
19 in the mobile space. Mobile being the largest gaming platform
20 in the world has a lot of publishers and developers so we
21 started with the broadest collection and tried to work down
22 through a criteria to the opportunities that would be a good
23 fit for us.

24 Q. Did you end up -- or can you tell us why you didn't
25 acquire Zynga?

1 **A.** I have a lot of respect for the people at Zynga and what
2 they've built. In the end for our opportunity, we thought we
3 needed to have something that was even bigger than what Zynga
4 was given our small -- very small starting space in the
5 mobile -- in the mobile gaming business.

6 **Q.** Let's turn to Activision -- Activision if we could.

7 Do you recall when you found out that Activision might be
8 an opportunity for you to acquire?

9 **A.** Yes. That would have been November of the -- what? --
10 2021.

11 **Q.** Did you speak to Mr. Kotick, the CEO, about the
12 acquisition?

13 **A.** I did. I gave him a phone call.

14 **Q.** Did you also have the folks at the company do an analysis
15 of Activision?

16 **A.** We did.

17 **Q.** Including a financial analysis?

18 **A.** We did.

19 **Q.** Did you also determine whether Activision met your
20 strategic goals?

21 **A.** We did.

22 **Q.** And just give an overall description of why Activision
23 meets both your strategic and financial goals.

24 **A.** Activision, while we're spending a lot of time talking
25 about Call of Duty on PlayStation, it turns out they're the

1 largest publisher of mobile content outside of China, meaning
2 Chinese companies that are not really companies that we can
3 acquire.

4 After we went through our Zynga work and analysis, I spent
5 time with Amy Hood, the CFO of the company, to look at the
6 mobile opportunities that were in the market and Activision was
7 the biggest publisher of mobile content, and it's a partner
8 that we know well given our long history of working together.
9 So we -- we both had comfort with the studios and the teams
10 but, most importantly, was their -- their portfolio and
11 engagement that they have on mobile.

12 **Q.** Did you make several presentations to the board as you
13 were considering and seeking approval of the acquisition?

14 **A.** We did.

15 **Q.** Turn to RX3166. This is a document under seal, but
16 there's a small portion on page 003 on the gaming industry
17 landscape. Do you see that?

18 **A.** I do.

19 **MS. WILKINSON:** Roger, would you mind putting up the
20 redacted version that we can show from page 3?

21 **BY MS. WILKINSON:**

22 **Q.** Did you share these numbers with the board of directors?

23 **A.** We did.

24 **Q.** And just to make the record clear, is this a board
25 presentation on December 8th, 2021?

1 **A.** It is.

2 **MS. WILKINSON:** We move in RX3166.

3 **THE COURT:** Admitted.

4 (Trial Exhibit 3166 received in evidence.)

5 **BY MS. WILKINSON:**

6 **Q.** And if we look at the numbers or the percentages over on
7 the left, they don't add up. Can you tell us why that is?

8 **A.** There are players that play on more than one platform.

9 **Q.** The percentage, though, of all gamers who play on mobile
10 is quite large; right?

11 **A.** Yeah. Mobile is by far the largest gaming platform.

12 **Q.** Then look over at the other side for the total. What is
13 the total revenue in the gaming industry as of 2020?

14 **A.** 216 billion.

15 **Q.** 2020. Sorry.

16 **A.** 216 million.

17 **Q.** How much is the mobile portion?

18 **A.** \$113 billion.

19 **Q.** When we looked at the figures from 2019, the mobile
20 portion was 87?

21 **A.** Yes. Mobile gaming is by far the fastest growing segment
22 as well.

23 **Q.** And is console growing relative to the PC and mobile
24 segments of the market or is it shrinking?

25 **A.** Even if console stays flat, if a segment like mobile is

1 growing quickly, it becomes a smaller part of the overall
2 gaming market. So it is shrinking as a percent of the overall
3 gaming market.

4 **Q.** And after this board presentation, did there come a time
5 when you and your staff and Ms. Hood did a valuation for the
6 Activision deal?

7 **A.** That's right.

8 **Q.** And tell us what -- from your business perspective, what
9 that was supposed to capture?

10 **A.** Whenever we're looking at an opportunity to acquire a
11 company, we're looking at the value to Microsoft, what we would
12 expect to be able to pay giving us up to some limit that we
13 would be willing to invest in an acquisition.

14 Obviously, a company, a publicly traded company is looking
15 for a return on investment. So your return should be higher
16 than what you're willing to pay. There has to be a delta
17 between what you're going to spend and what you're going to
18 acquire.

19 So we build a financial analysis to help us give a -- a
20 range for what we could afford to pay for a company and still
21 feel like we got the right return as a company.

22 **Q.** If anyone were to suggest that Microsoft would permit you
23 to pay, you know, any price just to get Activision, would that
24 be accurate?

25 **A.** It would not. The gaming business inside of Microsoft

1 actually runs as a standalone profit-and-loss business inside
2 of Microsoft. It's one of the few Microsoft CSAs, as we used
3 before, or businesses that runs that way.

4 And we have a commitment to the company and the board to
5 run a profitable and growing business where we are effectively
6 a standalone business inside of Microsoft.

7 **Q.** Did you stand before the board and tell them that you
8 believed that the price you were paying for Activision and the
9 strategic goals you had were sufficient to justify the -- the
10 purchase price of \$69 billion?

11 **A.** I did.

12 **Q.** Is -- there are synergies we saw earlier. We won't reveal
13 those numbers. But if one were to suggest those synergies
14 allowed you to lose money, for example, by pulling COD revenues
15 from PlayStation, would that be accurate or inaccurate?

16 **A.** That would be inaccurate.

17 **Q.** Why?

18 **A.** The commitments that I make to the board around the
19 financial return of any acquisition, especially one of nearly
20 \$70 billion, it's -- I look at it as critical to my job
21 function to deliver on the results that I commit to the board
22 and the company and manage an effective and growing business.

23 So when I'm presenting our financial view of Activision
24 and what I expect the return to be so that the company would
25 deploy that amount of money to go acquire Activision, it is

1 kind of critical to my job stability to that I deliver on that.

2 Q. Has Activision successfully developed a native game for --
3 a native Call of Duty for mobile?

4 A. They're very effective, yes, with Call of Duty mobile. It
5 is a very big franchise for them.

6 Q. Take a look at RX1147, please.

7 A. (Witness examines document.)

8 Q. Do you see that document?

9 A. I do.

10 Q. Is this an e-mail that includes Sarah Bond, you, Tim
11 Stuart, and Matt Booty?

12 A. It is.

13 Q. What is Mr. Stuart's job?

14 A. Tim Stuart is the CFO of Xbox.

15 Q. This is dated 5-2-2022?

16 A. It is.

17 MS. WILKINSON: Your Honor, we move in RX1147.

18 THE COURT: Admitted.

19 (Trial Exhibit 1147 received in evidence.)

20 BY MS. WILKINSON:

21 Q. And if you look through this. Go to page 2 and 3, did
22 someone take out the public numbers from Activision's 10K to
23 assess their revenue streams?

24 A. They did.

25 Q. Okay. If you turn to that, to page 2, and you see you ask

1 specifically "What line does COD mobile show up in Activision";
2 right? Do you see that in the middle of page 2? It's from you
3 to Tim and Sarah.

4 **A.** Yeah. I see my question, yes.

5 **Q.** Why were you interested in how much the revenues came from
6 COD mobile?

7 **A.** It is -- one of the biggest strategic assets for us in
8 this deal is mobile engagement and the size of the mobile
9 business for Call of Duty.

10 **Q.** Look on the first page and your e-mail, which is the
11 second from the bottom, and you say (as read):

12 "Wow. Huge percentage of COD revenue."

13 We all know what "wow" means, but can you put that in
14 perspective of why were you surprised about the size of the COD
15 mobile revenues?

16 **A.** I think to most people when they think about Call of Duty,
17 especially in the core gaming world, they think about it as
18 predominantly a console and PC game and that a majority of the
19 revenue comes from that market.

20 But when you actually look at the numbers, you realize
21 that Call of Duty mobile is a very significant part of the
22 franchise and really the biggest reach for Call of Duty in
23 their -- in the Call of Duty portfolio.

24 **Q.** Take a look at RX1156, please.

25 **A.** (Witness examines document.)

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1 Q. Is this another board deck that was presented regarding
2 the Activision Blizzard acquisition?

3 A. It is.

4 MS. WILKINSON: Your Honor, we move in RX1156.

5 THE COURT: Admitted.

6 (Trial Exhibit 1156 received in evidence.)

7 BY MS. WILKINSON:

8 Q. A transaction was announced on what day, Mr. Spencer?

9 A. I believe it was January 18th.

10 Q. And this is under seal, as you can see, but if you turn to
11 page 10 and it says "Activision Blizzard drivers."

12 A. Yes.

13 Q. And under almost every category do you include mobile?

14 A. Yes.

15 MS. WILKINSON: That's very kind of Mr. Weingarten.

16 BY MS. WILKINSON:

17 Q. And it says "existing business"; right?

18 A. It does.

19 Q. It says "Game Pass"?

20 A. Yes.

21 Q. It says "universal store"?

22 A. It does.

23 Q. And "advertising"?

24 A. Yes.

25 Q. Can you tell us what you mean by "universal store"?

1 **A.** Yeah. As Sarah was talking about, when you're playing on
2 your mobile phone, all of the monetization happens through
3 Google's store or Apple's store. So they capture all of the
4 transactions in gaming and almost every other category, which
5 is, say, different than on Windows where there is a Windows
6 store but there's a lot of other storefronts.

7 For us, we believe there's an opportunity create a gaming
8 storefront on Windows phones -- sorry, Windows phones -- on
9 mobile phones, not the Windows phone, for Apple and Google
10 phones where people can come to find games to play in a
11 storefront that was really tailored towards players on Google
12 and Apple's platform.

13 Now, Google and Apple will fight us to do this. They
14 don't openly allow other storefronts on their -- on the largest
15 gaming platform. So we -- as we talked about, we started with
16 the strategy of xCloud with maybe over the cloud outside of
17 their store we would be able to deliver content to them. This
18 is an approach of having a native storefront on a phone that --
19 where people could come to find our games and third-party
20 games.

21 **Q.** So today if you wanted to put your Xbox app in the Apple
22 app store, can you do that?

23 **A.** No. Apple blocks our Xbox app from their store.

24 **Q.** If you want to put your Xbox app in the Google store, can
25 you do that?

1 **A.** We can do that, but we can't -- we get no monetization.
2 They won't allow us to sell anything in our store, which
3 obviously makes it difficult for us to grow a business. So
4 both Google and Apple exert control over the largest gaming
5 platform.

6 **Q.** So when you have a game on your console and someone spends
7 money in the game, you get a portion of that; right?

8 **A.** We do.

9 **Q.** You're saying if that game were in the Google app store
10 under your Xbox or within your Xbox app, you could not collect
11 any monetization?

12 **A.** That's right. Google -- Apple won't let us put the
13 streaming app in their store so we can't bring the console
14 games through their storefront.

15 **Q.** In contrast, is Candy Crush in the app store?

16 **A.** Candy Crush is in the Apple's app store.

17 **Q.** Apple decides that game is okay, but your suite of games
18 is not?

19 **A.** That's right.

20 **Q.** And in Candy Crush is there in-game monetization?

21 **A.** There is, yeah. It is a free-to-play game, yeah.

22 **Q.** And do you know if the Call of Duty mobile game is
23 available on the Apple app store?

24 **A.** It is.

25 **Q.** And is there in-game monetization in that game?

1 **A.** There is.

2 **Q.** So if you owned those franchises, you would then be able
3 to at least collect the revenues that they generate within the
4 game?

5 **A.** Yes. In the existing business line, in the model, is the
6 capture of existing Call of Duty, Candy Crush on mobile
7 platforms.

8 **Q.** Do you know why Apple is not letting you put the GameBox
9 app within its app store?

10 **A.** Because it's competition for their control over the
11 largest gaming platform between them and Google. There's --
12 these are games that players want to play. We have a delivery
13 mechanism to deliver the games to those phones for their
14 customers, and they just choose to block it and they've been
15 allowed to do that.

16 **Q.** Aside from the revenues you would get if you owned Call of
17 Duty and Candy Crush, are there any other benefits you would
18 have in terms of learnings about mobile if you owned those
19 franchises?

20 **A.** Yes. Any launch for us of a store is -- it -- it's a
21 critical part of our strategy and I would say a high-risk part
22 of our strategy. One way to offset that risk is to have
23 millions of players of games on the store -- on the mobile
24 devices that you can then advertise to the fact that you have a
25 storefront available.

1 So instead of just launching a store today and trying to
2 find customers, when you have the users of Candy Crush and Call
3 of Duty and Diablo Immortal, which is another mobile game,
4 you're going to be able to gain exposure for the mobile store
5 that you've built through the engagement that you have with the
6 games that you own on the platform.

7 **Q.** Who's Amy Hood?

8 **A.** Amy Hood is the chief financial officer of Microsoft.

9 **Q.** We'll hear from her next week, but would you consider her
10 a rigorous reviewer of your financials?

11 **A.** The most rigorous I've ever found.

12 (Laughter)

13 **BY MS. WILKINSON:**

14 **Q.** How regularly does she review your financials?

15 **A.** Can I say daily? She's --

16 **Q.** Officially.

17 **A.** Yeah. Monthly. Amy is in a monthly business review for
18 the gaming business and other CSAs. It's part of the normal
19 rhythm of running the business.

20 **Q.** Do you work with her to set targets for your business?

21 **A.** We do, yes.

22 **Q.** What kind of targets do you set?

23 **A.** We will set annual targets. Microsoft's fiscal year is
24 July 1st through June 30th of the following year. So we're
25 right in the middle of getting ready for next fiscal year so a

1 lot of work. And our quarterly earnings that we would have as
2 a business, that's where I would say most of the effort goes
3 into in terms of locking what our expectation is for the
4 business. And I meet with her weekly on how the overall user
5 trends and metrics look for our business.

6 **Q.** Do you have margin targets?

7 **A.** Yeah, we have -- yes, we do. We have both gross margin
8 targets and accountability margin, the AM that we talked about
9 earlier, also known as profit. So we have both of those
10 targets for the business.

11 **Q.** If you don't meet those targets, say your accountability
12 margins, what does Ms. Hood do? Does she give you more money?

13 **A.** No. I mean, no, she does not. We have to grow the
14 business at what we would call the top line, grow the revenue
15 of the business and the profitability of the business; and if
16 we're not able to grow enough revenue to cover any cost
17 increases we have in the business, we have to find other ways
18 of cutting costs to meet the accountability margin targets that
19 we have as a business.

20 You can see job eliminations. Regretfully, we had some of
21 those this year. Cutting back on spend on other things in the
22 market. I think because the profitability of our business and
23 our commitment to deliver that is a nonnegotiable with the
24 company.

25 **Q.** As part of the valuation, did you make a commitment to

1 Ms. Hood and the board that you would meet that overall number
2 that you -- the purchase price, but the sub-numbers that
3 justify the purchase price?

4 **A.** Yes. They understood that the -- they understood the
5 financial model for the deal and my commitment behind every one
6 of the line items in the valuation model.

7 **Q.** So if someone were to suggest that you could just buy
8 Activision and lose a lot of money over time; is that correct
9 or incorrect?

10 **A.** That is incorrect. There's no part of our business where
11 I get to lose money over time. The overall part of our -- the
12 overall business for gaming has to be a profitable and growing
13 business, which is also why getting into mobile is so critical
14 for us.

15 **Q.** That said, is it you or Ms. Hood who decides how you're
16 going to meet those numbers?

17 **A.** I'm given latitude in managing the sub-numbers, if you
18 want to call it that, the intricacies of the business on a
19 per-title of business, ship dates of different games, marketing
20 budgets on where we're going to spend -- how much we're going
21 to spend on titles. So I'm given latitude on where I'm
22 spending money.

23 Amy will definitely spend time to understand the gives and
24 takes of our plan versus expectation, and she'll have her own
25 judge of the risk. But she gives Tim Stuart and I and our

1 Gaming leadership team support, but she definitely has a strong
2 point of view herself.

3 **Q.** Does she agree with your strategy to move as much as you
4 can into the mobile market?

5 **A.** She does and Satya and the board as well. One of the
6 challenges for us being the third place console manufacturer is
7 our margins are significantly lower than both Nintendo and
8 Sony's because we spend effectively the same amount of money on
9 our people and we sell fewer consoles so we make less money.

10 Inside of our company we have to find ways of growing the
11 profitability of the business. Growing from a third place
12 console position in a market that's not growing that we've
13 tried for 20 years is not really something the company is going
14 to support as our sole method of growing the business.

15 So for the longest time we've had discussions with the
16 board and the senior leadership team on how we find more
17 margin-positive ways for us to grow the gaming business all up.

18 **Q.** As the financial analysis was being done for the deal, did
19 you ever ask anyone to run a financial model to see what it
20 would look like if you did not provide Call of Duty to
21 PlayStation in the future?

22 **A.** We did not and, in fact, if you look at the deal model,
23 nowhere in the deal model is there any modeling of a shift of
24 share between us and PlayStation. If we had a plan -- if we
25 thought that this was a deal about driving more Xbox share

1 relative to PlayStation, you would see it -- a line called out
2 that would talk about the financial benefits of a share shift
3 between us and PlayStation, which is, as we've just gone
4 through, nowhere in the model. In fact, the only part of the
5 model -- or the biggest part of the model that includes
6 PlayStation is actually growing the existing business and
7 continuing to maintain that.

8 **Q.** Does the model include any increase in console sales based
9 on that -- you know, the alleged shift in the market if you
10 were to pull or not provide Call of Duty to PlayStation?

11 **A.** It does not. There was nothing about this deal. This
12 deal came from our need to find users and relevance on the
13 largest gaming platform, which are mobile phones. The fact
14 that Activision also builds PC and console games and we know
15 them was obviously part of our consideration in the overall
16 valuation, but this -- this deal has nothing to do with
17 increasing Xbox share.

18 **Q.** The FTC's economic expert, who will testify next week,
19 claims that it is in your financial interest, makes sense, for
20 you to pull Call of Duty from PlayStation and that there will
21 be a 5 percent or so share shift in the console market as a
22 result of that strategy. Has anyone ever suggested to you
23 that's a legitimate positive economic action?

24 **A.** Being honest, the CMA had a similar model at some point
25 that they -- the CMA being the U.K. regulatory body -- where

1 they had made a math error; and when we corrected the math
2 error, they reversed that point of view.

3 Nobody inside of Microsoft has ever presented a model that
4 would -- to me that would show that pulling Call of Duty off of
5 PlayStation would be beneficial to or would cover the cost that
6 we would -- the revenues we would lose.

7 **Q.** Setting aside the model, has anyone on your team suggested
8 "You know what would be a great idea? If we're allowed to buy
9 Activision, let's just withhold Call of Duty from PlayStation"?

10 **A.** No.

11 **Q.** Okay. In fact, when you announced the transaction, did
12 you reach out to your partners, including Sony, to assure them
13 that you would continue to allow them to have access to those
14 games on their platform?

15 **A.** We did.

16 **Q.** Did you personally speak to anyone at Sony?

17 **A.** I -- I spoke with the CEO of Sony Corporation,
18 Yoshida-san, and I had a conversation with Jim Ryan.

19 **Q.** What assurances did you give them?

20 **A.** It was -- with Yoshida-san it was Satya and Nadella and I
21 on the phone call, the CEO of Microsoft, and we -- we really
22 just explained the same rationale that we've talked about here
23 about this deal; and that this deal, we wanted to continue to
24 be a good partner for Sony which -- with Sony, which we feel
25 like we are today, in the shipping of games on their platform,

1 and that we would continue to do that after this deal closes.

2 And I got positive affirmations from Yoshida-san. Jim
3 Ryan and I had a slightly longer conversation just given we do
4 more business together, but had a similar outcome; that he
5 understood our rationale behind the deal.

6 And I think the e-mail exchange that was shared kind of
7 landed that -- shows that he understood that this was not about
8 PlayStation, which is what he shared.

9 And then I made a public statement as the deal was
10 announced, that I said we are committed to continuing to ship
11 Call of Duty on not only the PlayStation 5 but future versions
12 of PlayStation, assuming I don't know anything about their
13 future plans but I'll guess that there will be future
14 PlayStations that we would want to continue. And publicly Sony
15 affirmed that they believed our commitment -- or my commitment
16 that we would continue to ship Call of Duty on PlayStation.

17 **Q.** Have you made more formal offers to them in writing?

18 **A.** We have.

19 **Q.** Has that continued throughout the pendency of the
20 acquisition?

21 **A.** It has, yeah. Not always at a pace I would like, but
22 maybe a little bit on that just quickly.

23 As I mentioned earlier, we have a number of games in the
24 PlayStation store today, I think it's over 50, that we sell.
25 Some of those we acquired. Some of those we've launched. But

1 we don't have a deal on individual titles with Sony to ship.
2 We have a publisher agreement with Sony that allows us to ship
3 games on their platform, and it's a very cordial relationship
4 we have with them on shipping, and they support us well when we
5 ship games on their platform.

6 That -- so when we offer them something on a commitment, a
7 ten-year commitment, to ship Call of Duty on PlayStation or --
8 it's in the context of us already doing a lot of business
9 together and understanding both how to deliver games on
10 PlayStation and how to kind of partner with them as a platform.

11 **Q.** Maybe you can explain that a little bit more. When you
12 put a game on Nintendo or you put a game on PlayStation, do you
13 negotiate individual contracts for those games?

14 **A.** No, we do not. And it's the same when somebody ships on
15 Xbox. In general, what you do is a publisher would sign a
16 publisher license agreement -- we call it a PLA -- which
17 basically gives them the right to ship games on our platform,
18 and then we -- in the business terms that that will exist
19 under.

20 And that covers any game that a publisher would want to
21 ship on Xbox or we would want to ship on Nintendo or Sony. We
22 don't usually do individual deals for each title that ships on
23 the platform. It is -- we give them a heads-up that we're
24 going to ship Minecraft Legends, which is the last game we
25 shipped on PlayStation, and their account team works with our

1 team to ensure that the game ships seamlessly on their
2 platform.

3 Q. Let's fill in the blanks there since you mentioned
4 Minecraft Legends.

5 You were asked by counsel whether you updated or provided
6 Minecraft for the PS5; right?

7 A. Yes.

8 Q. How many Minecraft games are available today?

9 A. Today in the console space there are really three main
10 franchises. There's Minecraft, a game just called Minecraft,
11 Minecraft Dungeons, and Minecraft Legends. Those would be our
12 three main Minecraft games today.

13 Q. I want you to look at -- I think I have to hand it up to
14 you because I don't believe it's in your notebook -- RX3156,
15 and ask you if this is a public announcement of that Minecraft
16 Dungeons -- that Minecraft Dungeons will also be in PS Plus.

17 A. Yes. This is an announcement that Minecraft Dungeons will
18 be available on PlayStation Plus.

19 Q. So PS Plus is what you were talking to counsel earlier
20 about their streaming service used to be called something else?

21 A. PlayStation Plus is actually their content subscription
22 like Game Pass. So they have multiple tiers, but PlayStation
23 plus is kind of the base name for their version of Game Pass.

24 Q. Was their version of Game Pass called PlayStation Now in
25 the past?

1 **A.** PlayStation Now is their equivalent of xCloud, of their
2 ability to stream, and they've incorporated PlayStation Now,
3 which I don't believe is a name they use today. And I think I
4 have this right, but I apologize if I have some of it wrong.
5 So all of it now is part of the PlayStation Plus family of
6 subscriptions is my understanding.

7 **Q.** Okay. So if someone owns a PlayStation and they want to
8 play -- they want to buy the game on the PlayStation store, can
9 they buy Minecraft Legends?

10 **A.** Yes.

11 **Q.** Can they buy the Minecraft?

12 **A.** Yes.

13 **Q.** And can they buy the third game?

14 **A.** Minecraft Dungeons, yes, they can.

15 **Q.** And if they want to play it in PlayStation subscription
16 service, what Minecraft games can they play in the subscription
17 service?

18 **A.** Today we have a deal. This is an instance where we would
19 have had a deal with Sony. They would have come and asked to
20 put Minecraft Dungeons and PlayStation Plus -- sorry -- and
21 then we would have done a business deal that would have us
22 include Minecraft Dungeons in PlayStation Plus. I believe
23 today that's the only version of Minecraft that's in
24 PlayStation Plus, but it's not the only game that we've ever
25 put in PlayStation Plus. We've had other games that have been

1 in PlayStation Plus.

2 **Q.** I believe you explained this earlier, but this is a
3 different financial arrangement when you're putting it in a
4 subscription service than when you're just putting it in the
5 store and allowing them to purchase it and play it on their
6 device?

7 **A.** That's correct. When we're putting a game in the store,
8 as Mr. Weingarten and I talked about, there's a standard
9 revenue split of 70/30 that we expect. That's the kind of
10 agreed-upon financial relationship for games.

11 Because we're putting a game in the subscription, and as
12 you can see in the ad, the ad says "Play Dungeons for free on
13 PlayStation Plus," there's -- we're foregoing some sales of the
14 game. So there would be a financial -- direct financial
15 relationship with Sony on this title for inclusion in
16 PlayStation Plus.

17 **Q.** Okay. Let's talk -- well, let's finish up on this.

18 **THE COURT:** Why would you do that?

19 **THE WITNESS:** When a game reaches a certain point in
20 its evolution, in its sales, it's an opportunity for us to find
21 customers who did not originally buy the game, and obviously
22 the financial consideration that they would -- they would give
23 us.

24 In general, with Sony and Nintendo, we try to be good
25 content partners. So when a good business deal comes that

1 matches our kind of goals, we do a lot of work with both of
2 them, as well as with Valve, on the PC storefront to get our
3 games in front of as many people as possible.

4 So they -- they come to us. I say "they come to us."
5 There's an ongoing conversation between the account managers at
6 Sony and our Xbox Game Studios teams about things that we could
7 do together, and opportunities arise and we evaluate it; and if
8 it makes sense for us with timing and economics, then we -- we
9 would make that move.

10 I know we talked about console wars earlier so it could be
11 confusing. Like, why would we ever help PlayStation? Our
12 long-term goals in this business are to help grow the gaming
13 industry and be a substantial part of the growth in the
14 industry.

15 We are -- we do not model our success kind of at the sole
16 expense of other platforms that are there. It just doesn't
17 really make sense from a Microsoft perspective if the market is
18 a fixed size.

19 **THE COURT:** But it's on X Pass I would guess.

20 **THE WITNESS:** It is Xbox Game Pass.

21 **THE COURT:** So then someone who's on the
22 PlayStation -- someone on the PlayStation, they don't need,
23 then -- in other words, they'll buy Sony subscription service
24 instead of yours if they want to play the Minecraft?

25 **THE WITNESS:** That's right. So good clarification is

1 that Xbox Game Pass is not available on PlayStation. So when
2 we're looking at PlayStation customers, today, unless they're
3 also playing on PC Game Pass, isn't really an option for them
4 on PlayStation. So our choice for a PlayStation customer is
5 they would either buy our game; or if we have a relationship
6 with Sony, it would be part of the console -- the
7 PlayStation Plus subscription.

8 We love Game Pass and it's, I think, a good part of our
9 strategy, but it -- it is not really one of those things that
10 we see as pulling people away from PlayStation.

11 So participating -- since we're already selling games in
12 their store, participating in all of the ways that you can
13 monetize games on their platform in conjunction with Sony makes
14 sense for us.

15 **BY MS. WILKINSON:**

16 **Q.** Let's explain that just in some simple numbers.

17 **A.** Sorry.

18 **Q.** No. It's easy for you and a little harder for some of us
19 to understand, especially me.

20 So let's use your Minecraft Dungeons example.

21 **A.** Yes.

22 **Q.** It's in the PlayStation store?

23 **A.** It is, yeah.

24 **Q.** You get some revenue from that?

25 **A.** We keep 70 percent of the transaction, yeah.

1 Q. That's why it's worth having it in your competitors'
2 store?

3 A. Yes.

4 Q. And if they -- when you put it into their streaming -- I
5 mean, in their content library subscription service, you get
6 some kind of compensation for that as well?

7 A. We do from Sony, yes.

8 Q. A different calculation?

9 A. Yeah. It -- yes. It's usually more of an upfront
10 payment, just talking generalities, where it's the same that we
11 would do with Game Pass or if we -- let's flip it around so I'm
12 not talking about Sony doing their business.

13 When we would go to a game like Dungeons, this is our own
14 game, but say a third-party game, we would offer up a certain
15 amount of money upfront to include the game in our content
16 subscription for some amount of time.

17 And as the owner of the content, you look at your current
18 run rate of sales versus how much they're willing to give you
19 today and what period of time it will be in the subscription
20 and you make a balanced business decision based on that.

21 Q. Is this part of your process of deciding game by game
22 whether you're going to keep it exclusive or make it available
23 on multiple platforms?

24 A. Yeah. The managing the portfolio of games across so many
25 different platforms and so many different business models is an

1 ongoing discussion, which is maybe why I got a little bit
2 confused earlier about is there, like, one specific time when
3 I'm having this discussion. This is kind of a constant part of
4 managing 23 studios and the number of game franchises that we
5 have.

6 **Q.** So is it possible that you develop a game within Xbox --
7 so we'll call it a first-party game; right?

8 **A.** Yes.

9 **Q.** -- and you decide to make it available initially on Xbox
10 and on PC?

11 **A.** Yes.

12 **Q.** Can you reassess -- do you reassess that at times and
13 decide whether you're going to provide it on PlayStation and/or
14 Nintendo?

15 **A.** We do and we've done that in the past.

16 **Q.** And are there sometimes when you have games set that are
17 available initially on all three platforms?

18 **A.** We do.

19 **Q.** And then when you acquire studios that have existing games
20 on other platforms, especially those that involve
21 multiplatforms, do you maintain those on those platforms?

22 **A.** We do. When we closed the ZeniMax acquisition, two of
23 their what we would call ongoing service-based games where
24 customers engage with the games in an ongoing basis and those
25 games continue to evolve, Fallout 76 and Elder Scrolls online,

1 both of those games post-acquisition we've continued to update
2 and add content across PC, across PlayStation, and Xbox at
3 roughly the same time.

4 **Q.** Go back to Minecraft Legends. When it first came out, it
5 was available on Xbox and PC; right?

6 **A.** And Switch and PlayStation all on the same day.

7 **Q.** All on the same day and date?

8 **A.** Yeah.

9 **Q.** And that was in the store?

10 **A.** Yeah.

11 **Q.** On PlayStation, therefore, you could play. The only
12 difference is it wasn't in the subscription service right away?

13 **A.** Yeah. This game launched in April of this year, so it's a
14 relatively new game. Sony's policy is, for the most part, they
15 don't put day and date games in their subscription. So it's --
16 they're not -- I don't know of them asking about Legends in
17 PlayStation Plus.

18 But, yes, that game was available on Switch, PlayStation,
19 Xbox, and PC on its launch date and the players across all
20 those platforms could play together.

21 **Q.** Does Minecraft Dungeons have endgame monetization?

22 **A.** I don't believe there's any post-sale monetization or
23 endgame monetization in Minecraft Dungeons.

24 **Q.** So once you put it into Sony's subscription service,
25 you're not getting that additional revenue split because there

1 isn't post -- I don't know. What did you call it? Post --

2 **A.** Post-sale monetization.

3 **Q.** Post-sale monetization.

4 **A.** We will still sell some copies of the game; but, yes, for
5 the most part we're foregoing the retail revenue of people
6 buying the game when we put it into the subscription.

7 **Q.** So if there was any suggestion that you always are going
8 to make games exclusive to Xbox and PC, would that be correct
9 or incorrect?

10 **A.** That's incorrect.

11 **Q.** Even with regard to the ZeniMax games?

12 **A.** That's correct.

13 **Q.** And with regard, of course, to your plans with the
14 Activision games?

15 **A.** The Activision games will remain cross-platform.

16 **Q.** Including the Call of Duty game?

17 **A.** Call of Duty.

18 **Q.** And --

19 **A.** On Call of Duty, just specifically because you asked me a
20 good question right before lunch, I want to just be clear, yes.
21 Under testimony, Call of Duty will remain on PlayStation 5 and
22 future versions, as I said, of PlayStation.

23 I could imagine maybe somebody thinks there's some kind of
24 game I'm playing on which version of the console I'm committing
25 to. Our goal is to continue to make Call of Duty a great game

1 for this PlayStation and future PlayStations.

2 Q. Okay. Quickly go to the PX1065, which was in the FTC
3 notebook you got.

4 A. Oh, the FTC one.

5 Q. And you tell me when you're there.

6 A. 1065 you said?

7 Q. Yes, please.

8 A. (Witness examines document.)

9 Q. Big notebooks are not easy to work with.

10 A. I haven't been around this much paper in a long time.

11 Q. My team always gives me grief because I don't like those
12 big notebooks.

13 A. I might agree with them, but...

14 (Laughter)

15 BY MS. WILKINSON:

16 Q. Okay. Go to page 15 or 017 on the PX number, and do you
17 recall you and Mr. -- sorry -- Mr. Weingarten reading the
18 differentiated content section?

19 A. I do.

20 Q. And it talked about exclusive to the service
21 differentiates relative to other services?

22 A. I do.

23 Q. Turn to I think it's page 002 of that same document or the
24 e-mail that is attached to it.

25 A. (Witness examines document.)

1 Q. In the section where we just looked, where you were
2 talking about differentiated content, did you mean to suggest
3 to anyone that you would always have your content exclusive to
4 Xbox?

5 A. I did not.

6 Q. And if you look at the value drivers and you go back to
7 game -- down to "Game transactions," what does it say there?

8 A. It says (as read):

9 "We will continue to sell acquired games and
10 franchises across all gaming platforms. Previously
11 unavailable titles on Xbox will be brought over to the
12 platforms for additional monetization opportunities."

13 Q. Keep going.

14 A. Do you want me to keep going?

15 Q. Yes.

16 A. (as read):

17 "And future titles will no longer observe a delay on
18 launching on Xbox."

19 Q. Okay. So explain why in the differentiated content
20 section you're talking about exclusives, how do you reconcile
21 with the idea that you're still going to sell many of your
22 games cross-platform?

23 A. Yeah, the area that Mr. Weingarten and I were looking at
24 was a specific Game Pass area, not the overall strategy for
25 running our gaming business.

1 Gaming subscriptions are really differentiated based on
2 the platforms that's there. The highest value driver in the
3 gaming business are the hit franchises, and expanding the reach
4 of the franchises that you have is critically important to our
5 success.

6 **MS. WILKINSON:** All right. I just want to cover two
7 more topics, Your Honor. Is there a time when you want to take
8 a break?

9 **THE COURT:** Why don't we do it when you finish.

10 **MS. WILKINSON:** Okay. Great.

11 **BY MS. WILKINSON:**

12 **Q.** I want to talk to you about your competitors and where you
13 think the market is. Okay?

14 **A.** Yes.

15 **Q.** You got asked a lot of questions and were shown a few
16 documents about whether -- well, the implication was that
17 Nintendo is not one of your competitors; right? That was the
18 implication?

19 **A.** That was -- that was what was put forward, yes.

20 **Q.** Is that true?

21 **A.** In my mind, it is not.

22 **Q.** And do you get weekly reports on unit volume and share of
23 Gen 9 hardware that even includes Nintendo?

24 **A.** I do.

25 **Q.** Take a look at RX5046.

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1 **A.** Is this in the smaller book?

2 **Q.** Yes.

3 **A.** Okay. RX5 --

4 **Q.** Do I need to hand this up? Hold on. That's one we didn't
5 have an extra.

6 **A.** Okay.

7 **MS. WILKINSON:** Can I hand it to Mr. Spencer,
8 Your Honor?

9 **THE COURT:** You may.

10 **BY MS. WILKINSON:**

11 **Q.** Do you recognize that?

12 **A.** I do.

13 **Q.** Is that dated 3-17-2021?

14 **A.** Mine says January 11th, 2023.

15 **Q.** Okay. That's not the right document. Sorry.

16 This is the right document. I'm just going to give you
17 the one I have. I must have taken --

18 **A.** Unless I'm reading the wrong date.

19 **THE COURT:** You gave me a whole bunch of copies. Do
20 you want one?

21 **MS. WILKINSON:** Fine, Your Honor. Yes.

22 **THE WITNESS:** The December 5th, is that the --

23 **MS. WILKINSON:** No, that's not the right one.

24 **THE WITNESS:** Okay.

25 **MS. WILKINSON:** It's 3-17-21.

SPENCER - CROSS / WILKINSON

(Pause in proceedings.)

BY MS. WILKINSON:

Q. Here you go. Sorry about that.

A. That's okay.

Q. Now it's PX5046 dated 3-17-2021?

A. Yes.

Q. And is this just one example of the weekly reports that you get?

A. It is.

Q. Is it addressed to you?

A. This one is, yes.

Q. All right. We can't show this portion, but look at page 2, and does that include -- does that show console volume and share?

A. It does.

Q. And which consoles are included?

A. Xbox Series X and S as one combined number, PlayStation 5 and Nintendo Switch.

Q. And do you get regular reports on Nintendo Switch as well as PlayStation 5?

A. I get this report every week.

Q. Okay. Now, up at the top, though, it says "Gen 9 Hardware." Is that actually a correct description of all of these?

A. It should say "Current Gen."

1 Q. So explain that to the Court. What do you -- what's the
2 difference between "current generation" and "Generation 9" when
3 you're normally using those terms?

4 A. "Generation 9" is very much an industry term. As a
5 customer, you're walking into the store because you want to buy
6 a video game console and there are three manufacturers on the
7 shelf. There's one from Nintendo, one from Sony, and two from
8 Xbox.

9 So when we think about the consumer's purchase decision,
10 they're walking into the store hopefully to buy a video game
11 console. They're almost certainly, if they're going to
12 purchase, they're going to purchase one; and once they purchase
13 that console, that's where their gaming activity would happen.
14 And if they purchase the Switch, they likely did not purchase
15 an Xbox. So I would see it as competition.

16 Q. Counsel asked you about the differences between the Switch
17 and the Xbox. Do you think the differences he asked you about
18 make it a device that is not substitutable among your
19 customers?

20 A. No, not at all. In fact, the weekly run rates of this
21 chart, this analysis, that I get continue to show Switch as
22 usually the number one selling console. The decisions that
23 Nintendo made on that console to make it portable, which was
24 really their first pure portable console that also plugs into
25 the television; and if you look at the big third-party games

1 that are successful on that platform -- Fortnite, FIFA, even
2 Minecraft -- they're the same or very -- they're the same
3 third-party games that are successful on PlayStation and Xbox
4 for the most part. So people are playing the same third-party
5 games across Switch.

6 And as I said, the -- but the choices that Nintendo made
7 was obviously to put a screen on the device, to have a battery
8 inside, to make it dockable so that you can slide it into a
9 dock and the picture will then show up on your television if
10 you want to play --

11 Q. Meaning --

12 A. -- on the television.

13 Q. Sorry. Meaning it can act like a console?

14 A. It can act like what you'd consider a television-based
15 console; but when you want to take it with you on the go, you
16 slide it out of the dock and you can continue to play their
17 games. So --

18 Q. Go ahead.

19 A. So while we can analyze the graphical differences between
20 a Switch and a PlayStation or an Xbox, the design decisions
21 around the Switch were a console that would run on battery so
22 it has a power profile that's different.

23 They made different technical decisions to enable an
24 experience that they thought their customers would want to
25 have, and it's the best selling console right now in the

1 market.

2 So when I -- when people try to tell me it's not
3 competition -- competitive, for any number of reasons, I don't
4 believe that because I just look at what's selling.

5 Q. And this, I hope is obvious, but the Switch has a screen;
6 right? So you can carry it with you and see your game?

7 A. Yeah, the Switch has a screen.

8 Q. How about your Xbox?

9 A. The Xbox is in the PlayStation, rely on being plugged into
10 an external screen like a television, yeah.

11 Q. In your regular business, do you and Mr. Stuart track the
12 success of the Switch?

13 A. We do.

14 Q. Take a look at PX1145. It's a December 4th, 2020, e-mail
15 from Tim to --

16 THE COURT: Do you want to admit 5046?

17 MS. WILKINSON: I do, Your Honor. Thank you.

18 THE COURT: And 3156?

19 MS. WILKINSON: Yes.

20 THE COURT: Both admitted.

21 MS. WILKINSON: Yes, Your Honor.

22 (Trial Exhibits 3156 and 5046 received in evidence.)

23 THE WITNESS: 1145?

24 BY MS. WILKINSON:

25 Q. Yes, in the small notebook.

SPENCER - CROSS / WILKINSON

1 A. Oh, in the small.

2 Q. It's our PX1145.

3 A. (Witness examines document.) I have RX in the small
4 notebook.

5 Q. Okay.

6 A. Is it --

7 Q. Maybe it's in there. I just pulled it out to use it for
8 us.

9 A. Okay.

10 Q. It is. PX1145, which is in the big notebook.

11 A. Okay.

12 (Witness examines document.) Yes, I found it, the mail
13 from Tim to me.

14 Q. Right. You were discussing certain portions of this, but
15 I want to go to at the very top from Tim, and it says "Fourth
16 bullet." Do you see that?

17 A. I do.

18 Q. It's not redacted. What does that say?

19 A. (as read):

20 "Fourth bullet: Might be good to highlight that we
21 know we will likely be behind Switch and PlayStation 5 in
22 the holiday volume due to supply in addition to the comp
23 versus Xbox 360."

24 Q. Why is the holiday season so important to look at?

25 A. A majority of console sales are done in the -- in a

1 Northern American holiday period of December. So it's a -- in
2 that quarter, which is Microsoft's Q2, it's our largest selling
3 console quarter by far, and same thing with PlayStation and
4 Switch.

5 **Q.** Let's move to the other contention about the market that
6 the FTC has that it's U.S. only and not global. Do you agree
7 with that?

8 **A.** No. Gaming is very much a global market.

9 **Q.** Why? Why do you say that?

10 **A.** When you're building a platform, one of your primary
11 customers are the creators who are building games to run and
12 sell on your platform, and those creators are looking to reach
13 a global audience with the games that they are building.

14 So if you're going to offer a competitive and vibrant
15 platform for -- for creators, which is really the lifeblood of
16 this business, you need to be a relevant platform in all
17 markets where you find players.

18 **Q.** Is that one of your goals as you develop new games at
19 Xbox?

20 **A.** Yeah. Yes, it is. And as we work on Xbox's relevant --
21 relevance in different markets, it's important that we're
22 growing global share for Xbox because if you're one of the
23 world's biggest games, you're looking to make money off of our
24 game on the global market.

25 **Q.** Again, this may be obvious, but if you have many more

1 customers buying your game, what does that do for cost purposes
2 when you spend hundreds of millions developing a game?

3 **A.** If you're a third-party game, you're obviously, as we
4 talked about, capturing 70 percent of the revenue that you're
5 selling on our platform. So if we're there talking to an
6 Electronic Arts or a Take-Two or a Ubisoft, kind of big
7 publishers of video games, they are looking at their global
8 business and the role that Xbox plays in their global business.

9 Even for us with our first-party games, as we look to
10 reach as many customers as possible, we know there are gamers
11 in Europe, there are gamers in Asia, there are gamers in
12 South America, North America, us being a relevant and vibrant
13 platform in all of those regions is very important.

14 **Q.** With regard to first-party games or exclusive games for
15 the platform itself, does Sony have exclusive games?

16 **A.** Sony -- yes. Sony has a significant catalog of exclusive
17 games.

18 **Q.** How does it compare to the number of exclusives you have?

19 **A.** It's drastically larger, dramatically larger than what we
20 have on Xbox today, um, like multiples.

21 **Q.** What about Nintendo?

22 **A.** The same with Nintendo. Both Sony and Nintendo's first
23 party today is stronger than Xbox's.

24 **Q.** Is it fair to say, then, that exclusives are a part of the
25 video gaming business and everyone in the industry uses them

1 from time to time?

2 **A.** Yes. And it is an established part of the console
3 business, the video game business, and Sony and Nintendo are
4 very strong with their exclusive games.

5 **Q.** Finally, transactions you've done before Activision, it
6 was suggested yesterday -- maybe it was inaccurate -- that you
7 have done several transactions since 2021; is that right?

8 **A.** We've done one acquisition since 2021, which was ZeniMax.

9 **Q.** And are you aware of whether Sony has done any
10 acquisitions either right before this acquisition was announced
11 or since you announced it?

12 **A.** They've done a number of acquisitions even in the time
13 since we've announced this deal, the largest of which was
14 Bungie, which is a developer of many games; but one, a big one,
15 called Destiny, and I believe it was a \$5 billion acquisition
16 that was announced about a month or so after we announced our
17 Activision acquisition.

18 **Q.** Have you seen Sony make other competitive actions or
19 perhaps, you know, competitive responses since you've announced
20 the acquisition?

21 **A.** Sony continues to sign exclusive third-party games. As I
22 mentioned, one of those launched this week in
23 Final Fantasy XVI.

24 They've made investments in their cloud infrastructure
25 adding new features to their cloud capability as we've been

1 involved in this acquisition and the regulatory review of it.

2 They've acquired quite a number of studios in that time.

3 Yes, they continue to be very active and competitive in the
4 market.

5 Q. Let's use Final Fantasy XVI as an example. Was that game
6 available at some point on Xbox?

7 A. Final Fantasy XV, the prior version of Final Fantasy,
8 launched on Xbox and PlayStation day and date, and
9 Final Fantasy XVI has just launched for PC and PlayStation and
10 it skipped Xbox.

11 Q. So if someone is on Xbox, they can't play
12 Final Fantasy XVI?

13 A. Sony has an exclusive marketing deal for Final Fantasy XVI
14 so they're marketing it as a console exclusive given that it's
15 not available --

16 Q. Is that a popular --

17 A. -- on Xbox.

18 Q. Sorry. Is that a popular franchise?

19 A. Final Fantasy is one of the biggest game franchises with a
20 long history.

21 Q. What kind of game is it?

22 A. It's a great role-playing game developed by a publisher
23 called Square Enix. It's a Japanese publisher. You can
24 imagine Final Fantasy XVI, there have been 16 versions,
25 actually a couple more, of Final Fantasy and it is one of the

1 kind of historic video game franchises.

2 **Q.** We talked about how you tried to engage with Sony and
3 provide offers and counteroffers. I want you to look at RX2170
4 in the smaller notebook.

5 **A.** RX2170.

6 (Witness examines document.) Yes.

7 **Q.** And I don't expect you to memorize this, but do you know
8 that around December 23rd, 2022, Ms. Bond and others sent this
9 to Sony?

10 **A.** I do.

11 **MR. WEINGARTEN:** I'm sorry, Beth, I don't have that.

12 **MS. WILKINSON:** Here you go. Sorry.

13 **MR. WEINGARTEN:** Thank you very much.

14 **MS. WILKINSON:** Of course.

15 **BY MS. WILKINSON:**

16 **Q.** We're not going to discuss the details because it's under
17 seal, but I believe it's public.

18 What term have you offered for the Call of Duty franchise
19 to remain on PlayStation?

20 **A.** A ten-year term.

21 **Q.** And do you have any other games where you've promised to
22 be on -- put your game on another platform for ten years?

23 **A.** Call of Duty on the Switch, on Nintendo's platform. We've
24 made the commitment for Call of Duty on both Sony and Nintendo.
25 Nintendo has accepted the -- that offer. Sony has not.

1 Q. Any others?

2 A. Some of our cloud streaming deals that I think Sarah went
3 through, but not a traditional gaming console.

4 Q. Generally do you even make an independent financial
5 commitment for a term of years when you're putting a game on
6 someone else's platform?

7 A. We do not. As I was stating earlier, that we ship games
8 on other platforms on a per-title basis only when we're doing
9 something unique from a marketing or distribution standpoint
10 where we usually have independent deals.

11 Q. And despite your lack of success, do you still hope that
12 you and Sony will come to an agreement so you can keep Call of
13 Duty on PlayStation?

14 A. I do.

15 MS. WILKINSON: That's all I have, Your Honor.

16 THE COURT: All right. Why don't we take -- do you
17 want to admit 2170?

18 MS. WILKINSON: Yes.

19 THE COURT: Admitted.

20 (Trial Exhibit 2170 received in evidence.)

21 THE COURT: We'll take a 10-minute break.

22 (Recess taken at 2:18 p.m.)

23 (Proceedings resumed at 2:29 p.m.)

24 THE CLERK: Court is now in session.

25 THE COURT: Okay. Mr. Weingarten.

SPENCER - REDIRECT / WEINGARTEN

1 **MR. WEINGARTEN:** Before I begin, Your Honor, I just
2 want to say I'm going to move as quickly as I can because we
3 have a third party, a Google witness, and I want to make sure
4 this person gets on and off today for their convenience. So is
5 it possible we might be able to stay past 3:00 for a little?

6 **THE COURT:** Is that okay with you, Ms. Knox?

7 **MR. WEINGARTEN:** I'll go slower.

8 **THE COURT:** Do you have --

9 **THE OFFICIAL REPORTER:** Yeah, as long as you're not --

10 **MR. WEINGARTEN:** Okay. Thank you, Your Honor.

11 **THE COURT:** All right.

12 **MR. WEINGARTEN:** I'll try to be efficient but not talk
13 too fast.

14 **THE OFFICIAL REPORTER:** Thank you.

15 **THE COURT:** Okay.

16 **MR. WEINGARTEN:** I'm sure the witness appreciates
17 that. Thank you.

18 **REDIRECT EXAMINATION**

19 **BY MR. WEINGARTEN:**

20 **Q.** Okay. Mr. Spencer, you were asked a little bit about
21 whether you could promise here in court that you would ship on
22 PlayStation 5, and the judge asked you a question, and you
23 later clarified it's not just about PlayStation 5, it's about
24 all the versions.

25 So can you swear under oath that without looking at any

1 future terms that need to be hashed out, you'll ship all the
2 versions of Call of Duty that may exist -- on all the versions
3 of PlayStation that may exist in the next ten years?

4 **A.** That's my goal, yes.

5 **Q.** Well, that's your goal, but can you swear without
6 reviewing terms -- let me back up a second.

7 Before an agreement is made to ship a game like Call of
8 Duty on PlayStation, there's a lot of terms in a contract like
9 that; right?

10 **A.** No, not usually. Usually when we ship a game on a
11 platform, it falls into our publishing licensing agreement.

12 **Q.** Well, Ms. Wilkinson showed you RX2170, which is this
13 proposal from Microsoft to PlayStation. So it's not about Call
14 of Duty. So it's not just going to fall under the usual
15 Microsoft PlayStation agreement; right?

16 **A.** Well, it could have; but as part of us getting passed into
17 this regulatory review, it has been asked that we make a future
18 commitment for a game that we don't own on future development
19 so that is when we end up into an agreement.

20 **Q.** Okay. And this agreement, have you ever seen it before?

21 **A.** I haven't read the full agreement. I know the pertinent
22 deal terms.

23 **Q.** Okay. And are you responsible for negotiating this
24 agreement with Sony?

25 **A.** I am not.

1 Q. All right. And this agreement has a lot of terms and a
2 lot of provisions, and there's been some back and forth with
3 Sony about it; right?

4 A. There has.

5 Q. And redlines? You know what a redline is?

6 A. I do.

7 Q. And those have gone back and forth between Microsoft and
8 Sony?

9 A. They have.

10 Q. Okay. And so when you say you swear under oath that
11 you'll ship Call of Duty on all the future versions of
12 PlayStation, you mean after you reach agreement, I assume, on a
13 contract like this one?

14 A. My goal is that we would -- we would ship Call of Duty on
15 all future versions of PlayStation. I don't own the future
16 versions of PlayStation nor can I even dictate there are future
17 versions of PlayStation. So I -- I just want to understand
18 exactly the question that you're asking.

19 I answered Your Honor's question. I tried to completely.

20 Q. So my question, I'm just trying to understand: Can you
21 swear under oath that you can promise that you'll ship Call of
22 Duty on PlayStation, all the future versions, whatever they
23 might be, for ten years without knowing what the terms are that
24 the parties are going to agree to?

25 THE COURT: No, that's not true. It's not going to be

1 for zero dollars.

2 **MR. WEINGARTEN:** I appreciate -- exactly, Your Honor.

3 **THE COURT:** Well, no, that was understood.

4 **BY MR. WEINGARTEN:**

5 **Q.** Well, somewhere between, Mr. Spencer, a zero and another
6 amount, you guys have to reach agreement on a lot of different
7 terms before you'll be able to promise and have Call of Duty
8 move onto PlayStation; correct?

9 **A.** We do not have to agree -- we do not have to reach
10 agreement to ship most games on PlayStation, like Minecraft
11 Legends. We just announce that we are able -- that this game
12 is coming, and the PlayStation team accepts that as part of
13 their portfolio.

14 So in answering the question, I have in my head a
15 framework that we know how to ship games on PlayStation and
16 what the standard business terms are.

17 If what you're try to propose is that Sony might offer or
18 change the standard business terms of how we ship products on
19 their platform, then, yeah, I think that would -- that would
20 prohibit us from shipping on their platform.

21 **Q.** And this agreement RX2170, to the extent you looked at it,
22 is not the Microsoft standard Sony agreement? It's a brand new
23 one; right?

24 **A.** Sony is asking for significant commitments beyond the
25 standard shipping of the game on the platform that has caused,

1 as you said, the deal to go back and forth even though we know
2 how to ship games at parity on PlayStation, which we do on a
3 regular basis.

4 **Q.** Okay. Would you make the same promise with respect to all
5 of Activision's content?

6 **A.** I was asked specifically about Call of Duty, which is
7 the -- I can't -- no. Activision ships games on mobile, on
8 many different platforms. They have some PC-only games, like
9 World of Warcraft. I don't think there's a blanket statement
10 you can make for Activision Blizzard King content on
11 PlayStation.

12 **Q.** What about Diablo? Can you promise you'll ship on all
13 future versions on PlayStation?

14 **A.** Can I promise? I am able to promise, yes.

15 **Q.** Are you able to bind Microsoft today? Are you able to
16 bind the corporation here today?

17 **MS. WILKINSON:** Objection, Your Honor. This is
18 argument.

19 **MR. WEINGARTEN:** I think the point has been made. I'm
20 happy to move along, Your Honor.

21 **THE COURT:** Why don't we move along.

22 **MR. WEINGARTEN:** All right.

23 **BY MR. WEINGARTEN:**

24 **Q.** You talked with Ms. Wilkinson a lot about free to play and
25 mobile and changes in the industry; right?

1 **A.** I did.

2 **Q.** Okay. And you looked at a deal value -- valuation model
3 that Microsoft put together for Activision; right?

4 **A.** We did.

5 **Q.** Okay. And the mobile-related synergies in that model,
6 they were a small portion of the total value; correct?

7 **A.** No, I don't believe that's true.

8 **Q.** Okay. Can you look at RX1093, please?

9 **A.** (Witness examines document.)

10 **Q.** I'm sorry. Let's do 1156, please.

11 **A.** Still RX?

12 **Q.** Yes, sir.

13 **A.** (Witness examines document.) I have it.

14 **Q.** Look at the number that says "Total Value to Microsoft."
15 Do you see that?

16 **A.** Sorry. On what page are you on?

17 **Q.** I apologize. 013.

18 **A.** 013. Sorry.

19 (Witness examines document.) Yes.

20 **Q.** Okay. And that is the value to Microsoft that's been
21 calculated in the model; right?

22 **A.** It is.

23 **Q.** Okay. And there's a total number in the bottom right
24 corner?

25 **A.** There is.

1 Q. And one of the rows says "Mobile Store" and there's a
2 value there; right?

3 A. For mobile store, yes, there is.

4 Q. And there's a -- and that's the only value that's
5 attributed to scaling the Xbox store to mobile; right?

6 A. That's the only store value. You asked me if that was the
7 only mobile value.

8 Q. Okay. That's the only value attributable to this idea of
9 unlocking the duopoly that you were talking about on phones?

10 A. That is the only store value, yes, of being able to sell
11 games on the phone.

12 Q. Okay. So the whole thing you were talking about where
13 there's iPhone and Google and their stores and you were talking
14 with Ms. Wilkinson about a plan that if this deal goes through,
15 Microsoft wants to become a new store on mobile phones;
16 correct?

17 A. That's correct.

18 Q. Okay. And the value, if that happens, let's calculate it,
19 is that number on the -- one, two, three -- fourth row down;
20 right?

21 A. That is where we've captured the value, yes.

22 Q. Okay. And that number compared to the total number is not
23 half; right?

24 A. Your original question was -- sorry. Yes, that is not
25 half of the other number.

1 Q. Sorry for the vagueness. I'm trying to talk around it.

2 You talked about how you have these commitments to the
3 board, and Ms. Wilkinson suggested that somehow we're
4 suggesting you would lose money on your synergies. And
5 I believe you said it was critical to deliver to the board on
6 your commitments; right?

7 A. Yes.

8 Q. Okay. Was it critical to deliver to the board on your
9 commitments in the ZeniMax deal?

10 A. Yes.

11 Q. But you took Redfall exclusive; right?

12 A. We did.

13 Q. And you took Starfield exclusive; right?

14 A. We haven't shipped but, yes, it will be exclusive.

15 Q. And the deal model that had the commitments for ZeniMax
16 that went to the board did not show those titles going
17 exclusive, did it?

18 A. It did not have Redfall in the deal model at all.

19 Q. Okay. You talked about Call of Duty mobile -- and this is
20 getting back to your point about mobile -- and how there were
21 benefits to Microsoft from getting all the learning that
22 Activision had about building Call of Duty for mobile; right?

23 A. No. I said from running Call of Duty on mobile --

24 Q. Okay.

25 A. -- and having the engagement. It wasn't built by

1 Activision.

2 Q. Okay. Let's get that out.

3 So Activision didn't actually build Call of Duty mobile,
4 did they?

5 A. No. They own it, but they did not build it. They had an
6 external developer build it.

7 Q. They had to pay someone else to handle building Call of
8 Duty mobile?

9 A. They would have had to pay their own employees if they
10 would have built it as well.

11 Q. I appreciate that, but they actually paid someone else to
12 build Call of Duty mobile; right?

13 A. Yep, they paid a company to build Call of Duty mobile.

14 Q. Okay. You talked about Ms. Hood and you said, "If I don't
15 meet my margins, she doesn't give me more money." Something
16 like that; right? She runs your business pretty strictly?

17 A. She requires that we run our business pretty strictly,
18 yes.

19 Q. Okay. But your business is not necessarily meeting your
20 internal targets today; right?

21 A. It is not right now, no.

22 Q. And I believe you testified earlier and we talked about
23 you have a view that the business is not strong in a general
24 sense; right?

25 A. Today being with the majority of our business residing as

1 the third place console business, we are not a robust business,
2 yes.

3 Q. But Ms. Hood approved a \$70 billion acquisition for your
4 business; right?

5 A. The board approved the \$70 billion acquisition.

6 Q. Okay. So despite the weaknesses you've described, you got
7 a \$70 billion approval?

8 A. The approval -- the deal, as we've talked about, expands
9 our business to the mobile platform to help us specifically for
10 the reason that you're talking about; that the existing
11 business that we run today as the third-party place console
12 business is a very difficult business to drive profit and
13 margin. So the opportunity for us to expand into a meaningful
14 way onto mobile, the world's largest gaming platform, was
15 really the both strategic and business opportunity behind this
16 deal. So, yes, exactly.

17 Q. Okay. So you're paying \$70 billion for a mobile business?

18 A. The business is across mobile, PC, and console; but when
19 you think about the unique capability relative to what our
20 business has today, it's really the mobile engagement and
21 business that Activision drives.

22 Q. Okay. You talked about in the commitments that you have
23 the discretion to decide how Microsoft Gaming is going to meet
24 those commitments; right?

25 A. To some extent.

1 Q. Okay. So, for example, you have latitude to make
2 decisions about how you think Microsoft Gaming can best compete
3 and still hit numbers that the board was presented; right?

4 A. To some extent, yes.

5 Q. And if you could make a decision that would benefit
6 Microsoft and harm Microsoft's competitors in any of the
7 markets we've been discussing, that would be good for Microsoft
8 Gaming's numbers; right?

9 A. We are trying to compete in the market by growing our
10 business. Some of our business growth is obviously growth that
11 our competitors would like to have. So in the end, our growth
12 probably somewhere comes from some of our competitors not
13 realizing that growth themselves.

14 Q. Okay. Great.

15 We talked about you said, "You know, we didn't model share
16 shift," when you were doing the model for the board; right?

17 A. That is accurate, we did not model any console share shift
18 in the deal model.

19 Q. But the question I just asked you makes it pretty clear
20 that if Microsoft is going to grow, particularly in a business
21 like console, then it can grow by taking share from its
22 competitors. That's how it would grow?

23 A. There's no console growth in our deal model.

24 Q. I understand, but do you have any intention of this deal
25 helping you climb out of the number three spot?

1 **A.** In console we do not.

2 **Q.** Okay. So that's just a write-off?

3 **A.** I don't understand how it's a write-off.

4 **Q.** Okay. You said you have a cordial relationship with Sony
5 and a good relationship when it comes to being partners on
6 games shipping on Sony platforms?

7 **A.** We do.

8 **Q.** Okay. But previously we saw some of the e-mails where you
9 were talking about withholding certain versions of Minecraft
10 from Sony; right?

11 **A.** We did.

12 **Q.** That's part of the same relationship?

13 **A.** We -- part of the same relationship. We have a
14 multifaceted relationship with Sony. As I've stated, we have
15 probably 50 games in their store. There are ongoing
16 conversations about the updates and monetization of all of
17 those games that we have; and with any partner, there's some
18 areas where we agree and some areas where we disagree on
19 per-title work that we should do.

20 **Q.** And it's a multifaceted relationship because in the one
21 facet you provide content that goes onto Sony platforms; right?

22 **A.** Yes, we do.

23 **Q.** And in another facet, you're a competitor to Sony, for
24 example, in selling consoles or subscription or cloud?

25 **A.** Yes.

1 Q. You talked with Ms. Wilkinson quite a bit about Minecraft.
2 I just want to still be clear.

3 The version of at least one of the Minecraft titles that's
4 on the PlayStation 5 was not optimized for PlayStation 5;
5 correct?

6 A. That is correct. All three versions of Minecraft that we
7 launch are available on the PlayStation 5. The recent one is a
8 PlayStation 5 optimized game. The oldest of the three, which
9 is now over ten years old, has not yet been upgraded for the
10 PlayStation 5 but is completely playable on the PlayStation 5.

11 Q. I appreciate that. So PlayStation 5 has backwards
12 compatibility so you can play your PS4 game on PlayStation 5;
13 right?

14 A. You -- yes, you can.

15 Q. Okay. But Xbox got the optimized Gen 9 versions of all
16 Minecraft titles; right?

17 A. It's the same discussion we had. We started our own
18 development kits for that platform when we had access to them.
19 We did not get access to the Sony development kits in time to
20 hit their launch with the upgraded version of Minecraft.

21 Q. Okay. Did you communicate to Mr. Leder in the fall of
22 2021 that all future ZeniMax titles would be exclusive to the
23 Xbox ecosystem?

24 A. I don't remember communicating to Mr. Leder in 2021 that
25 that would be true. It's not true. We just shipped our

1 biggest update to ESO, Elder Scrolls online, this year on
2 PlayStation, which is one of our ZeniMax studios. So if I said
3 it, it factually isn't true because we're continuing to ship
4 games on PlayStation.

5 Q. Well, I appreciate that's an update, but the new titles.

6 A. It's not actually an update. It's a new content addition
7 to an existing multi -- massively multiplayer game.

8 Q. You were here in the courtroom when we saw some of the
9 conversation and chats that Ms. Lawver was having; right?

10 A. I was.

11 Q. Okay. And were she and Mr. Stuart just wrong when they
12 were chatting about you having told Mr. Leder that all future
13 titles would be exclusive?

14 A. They're factually wrong because we continue to ship games
15 on PlayStation.

16 Q. Were they wrong that you said that?

17 A. I don't know. I don't remember saying that. If we have a
18 chat stream or a deck that I created where it says that, I
19 could review it.

20 Q. Uh-huh. Ms. Wilkinson towards the end was talking about
21 the competitor set, and you were talking about how you think
22 it's incorrect to say that Nintendo is just not a competitor;
23 right?

24 A. I do think that's incorrect.

25 Q. Right. But let me ask you this: As between PlayStation 5

1 and the Nintendo Switch, who's the closer competitor to the
2 Xbox series?

3 **A.** The PlayStation 5 and Xbox series got shipped at the same
4 time, don't have a screen, aren't able to be taken on their
5 own. So from a form factor perspective, those two kind of
6 functionally look more equivalent.

7 **Q.** Well, even just aside from functionally looking more
8 equivalent -- even putting aside form factor -- which you would
9 agree is radically different between these devices; correct?

10 **A.** The Switch is radically different than the other ones,
11 yes.

12 **Q.** Even putting aside form factor, would you agree that the
13 PlayStation 5 is a closer competitor to the Xbox series
14 consoles than the Switch?

15 **A.** I don't know how you're defining "closer."

16 **Q.** Okay. Ms. Wilkinson showed you RX5046. Can you please
17 look at RX5046?

18 **A.** (Witness examines document.)

19 **Q.** I think it was a loose piece of paper. Sorry.

20 **A.** Sorry. Those --

21 **Q.** This gaming data service is one.

22 **A.** Yeah. I have two of them. If you can give me the date.

23 **Q.** Yeah. Sorry. It's the one that says "5046" on the bottom
24 and the date is March 17, 2021.

25 **A.** Got it. Thank you.

1 Q. Yep. And there's a box that we're not going to talk about
2 the numbers, but it's a chart?

3 A. Yes.

4 Q. Ms. Wilkinson talked about how the chart shows all three
5 groups; right?

6 A. It does.

7 Q. And you corrected the chart. You said the chart should
8 not be called "Gen 9 Hardware." It should be called "Current
9 Generation Hardware"; right?

10 A. I think that would more accurately track what it's
11 showing, yes.

12 Q. Because "Generation 9" is an industry term that would not
13 apply to the Switch; right?

14 A. It's just an industry term that I don't think most
15 consumers recognize as part of their decision-making process.

16 Q. I appreciate that. That was not the question.

17 A. Sorry.

18 Q. The question was: It shouldn't say "Gen 9" because Gen 9
19 is not applicable to the Switch; right?

20 A. When I was answering that question, I was answering more
21 from a forward-looking market perspective. I was not answering
22 it based on the criteria you're giving me right now.

23 Q. I'm sorry?

24 A. I'll say it again. I think of it as the current products
25 that are in the market. This is a weekly run rate of console

1 sales, I believe, in the U.S. market but could be global, I'd
2 have to look at it, that shows me how the different consoles
3 are selling in the market.

4 So I don't think it's a breakdown by generation. I think
5 it is consumer activity in the market so I use the word
6 "current" to reflect what currently is selling.

7 **Q.** Do you believe the Gen -- that the Switch is a Gen 9
8 console?

9 **A.** I do not.

10 **Q.** Okay. And I appreciate you calling it out.

11 The title page on 5046 is the U.S. weekly call down;
12 right?

13 **A.** This one is U.S., yes.

14 **Q.** You get regular reports on what's going on in a market
15 that is geographically the United States; right?

16 **A.** I get many different reports. I'm just saying the one
17 that you're showing me here is a U.S. -- happens to be a U.S.
18 report.

19 **Q.** Okay. And, interestingly, we talked about with
20 Ms. Wilkinson how the Switch outsells by a fair margin in terms
21 of volume here the PlayStation 5 and the two series put
22 together; right?

23 **A.** It does.

24 **Q.** But they're listed with Series X and S first because
25 that's your product; right?

1 **A.** I don't know why it's listed first.

2 **Q.** Well, that's your product; right?

3 **A.** It is our product. Sorry. Yes.

4 **Q.** Okay. And then comes PlayStation 5 next in the list;
5 right?

6 **A.** Yes.

7 **Q.** And then comes Switch at the bottom of the list even
8 though they're the number one seller.

9 You don't give any -- there's no significance to the fact
10 that your reporting is Xbox Series X, S, then PlayStation 5,
11 and then Switch?

12 **A.** This report comes -- my understanding is it comes from a
13 third-party data source and gets translated by our data team to
14 us. I have no idea the significance of the order. As you
15 said, it happens that the largest share console happens to be
16 the third one listed in the list, but I do not know why that
17 is.

18 **Q.** Okay. When you talked with Ms. Wilkinson, you talked
19 about at the very end Final Fantasy XVI, and I believe
20 there's -- you talked about how you think there's a marketing
21 deal between Sony and the company that makes Final Fantasy XVI;
22 right?

23 **A.** Sony is marketing the game as a console exclusive.

24 **Q.** Okay. And I believe you've testified in the past that as
25 head of Gaming for Xbox, you just can't afford to make those

1 kinds of upfront payments to compete with Sony on exclusives;
2 right?

3 **A.** It is more expensive -- yes, it is more expensive for us
4 to pay somebody to not ship on PlayStation than it is for Sony
5 to pay somebody to not ship on Xbox.

6 **Q.** It's economically difficult for you to make an upfront
7 payment like that that you think the way Sony can?

8 **A.** Yes. Given our share position in the market as the third
9 place, paying somebody to skip the console that has twice the
10 market share of us is more expensive.

11 **Q.** Now you have \$70 billion upfront payment that you're
12 making to Activision; right?

13 **A.** No. When you acquire something, it's not a payment. It's
14 actually you're -- you're taking -- it's like when you buy a
15 house, that you don't -- you're buying an asset that has value.
16 So it is really a transfer of cash into an asset called
17 Activision that you believe retains the value that you
18 acquired.

19 So to try to characterize the \$70 billion as somehow spent
20 is incorrect financially. It's really moving \$70 million [sic]
21 in cash into an asset, which is a game publisher, that you
22 believe to us is actually worth more than \$70 billion. So it
23 is not spent.

24 **Q.** Well, presumably when Sony spends money on exclusive with
25 Final Fantasy XVI, it's at least in part because there's some

1 brand effects that will come from having such an exclusive;
2 right?

3 **A.** Yes. When you do those deals like us on an operating -- a
4 P&L for a business, a profit and loss statement, for a year,
5 the cost of those deals hit your P&L when you spend the money
6 to pay for exclusivity. They do for us. I presume Sony runs
7 with the same accounting practices.

8 When you acquire an asset, it is not a profit-and-loss
9 transaction as. It is a balance sheet transaction. I'm not an
10 accountant so everything I learned was from Jamie Lawver, who
11 we had earlier. But it is not the same when you're paying
12 in -- in on P&L as opposed to when you're acquiring something.

13 **Q.** So the \$70 billion that's being spent by Microsoft for
14 Activision in your view is not about \$70 billion going out the
15 door? It's about acquiring an asset that will have enduring
16 value to Microsoft?

17 **A.** Yes. Presumably after you acquire it, the asset still has
18 \$70 billion in value that you could potentially sell.

19 **Q.** We saw the number about the value in the board deck;
20 right?

21 **A.** We did.

22 **Q.** And that number is bigger than 70 billion; right?

23 **A.** That number is the value to Microsoft, not what we're
24 spending in the market.

25 **Q.** It's quite larger than 70 billion; right?

1 **A.** As a -- yes, it is. As a company, when we're going to put
2 that much capital, \$70 billion, into the market, the company is
3 going to look to make money on the money it spends so there
4 would be no reason to look at the transaction if the value to
5 Microsoft was equal or less than what we were spending.

6 **MR. WEINGARTEN:** Okay. Let me just check with my
7 colleagues, Your Honor. If I may have one minute.

8 (Pause in proceedings.)

9 **MS. WILKINSON:** I have nothing, Your Honor.

10 **MR. WEINGARTEN:** Oh, wait. Okay. I just have one
11 more. Sorry. I haven't finished yet. You might.

12 **BY MR. WEINGARTEN:**

13 **Q.** Just going back to the commitment -- not to try anyone's
14 patience here -- the commitment you made when the Court asked
15 you a question. That was about consoles when you answered;
16 right? You talked about PlayStation 5?

17 **A.** I think you asked me about PlayStation.

18 **THE COURT:** I think so.

19 **THE WITNESS:** Yeah. I was trying to answer.

20 **BY MR. WEINGARTEN:**

21 **Q.** Are you going to make the same commitment under oath with
22 respect to cloud?

23 **THE COURT:** What cloud?

24 **MR. WEINGARTEN:** Sony's cloud, that you would ship
25 Activision, Call of Duty --

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1 **THE COURT:** I don't think that's it. I'm going to cut
2 off the question there.

3 **MR. WEINGARTEN:** Thank you, Your Honor.

4 **THE COURT:** Okay.

5 All right. Mr. Spencer, you may step down.

6 (Witness excused.)

7 **THE COURT:** All right. We have another witness, our
8 last witness and a short witness everyone promised, for today.

9 **MR. WEINGARTEN:** Your Honor, the FTC calls
10 Mr. Dov Zimring. My colleague Cem Akleman will be examining.

11 **THE COURT:** All right.

12 **THE CLERK:** Please raise your right hand.

13 **DOV ZIMRING,**

14 called as a witness for the Plaintiff, having been duly sworn,
15 testified as follows:

16 **THE CLERK:** Please state your name for the record.

17 **THE WITNESS:** Dov Zimring.

18 **THE CLERK:** Thank you.

19 **THE COURT:** Thank you for waiting today.

20 **DIRECT EXAMINATION**

21 **BY MR. AKLEMAN:**

22 **Q.** Good afternoon. Mr. Zimring.

23 Are you currently employed at Google?

24 **A.** Yes, I am.

25 **Q.** How long have you worked at Google?

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1 A. 13 years.

2 Q. And what's your current position?

3 A. I'm a product director in core, which is an internal team
4 within Google.

5 Q. And how long have you worked in the tech industry?

6 A. Over 25 years now.

7 Q. Prior to your current position, what was your position at
8 Google?

9 A. For roughly the last decade I worked on Stadia. I was the
10 first employee on Stadia, and I was there from the very
11 beginning to the very end.

12 Q. And what was the title that you held in January of 2023?

13 A. I was the product director for Stadia.

14 Q. Have you ever worked on Google's mobile store application
15 called Play?

16 A. No.

17 Q. What was Stadia?

18 A. Stadia was a cloud gaming service developed by Google.

19 Q. What's a cloud gaming service?

20 A. So cloud gaming is intended to offer consumers the ability
21 to enjoy entertainment, interactive entertainment, without the
22 need for physical devices. So enabling game play on any
23 connected screen.

24 Q. Can you describe some more of the features of a cloud
25 gaming service?

1 **A.** Certainly. The -- at least with respect to Stadia, the
2 intention was to provide access to the best games that existed
3 in the market, and over time games that could not be built on
4 legacy console or PC architectures. So games that could take
5 advantage of the data center as sort of the creative canvas for
6 the game developers.

7 Features included just the ability to click to play so you
8 wouldn't need to wait for long downloads or have physical
9 media, or anything like that, and associate that with any
10 particular screen. So similar to the way we enjoy music and
11 movies today, the ability to enjoy content that is interactive
12 on any connected screen.

13 **Q.** Okay. So a gamer wouldn't need to download a game? They
14 can play it instantly, is that --

15 **A.** Correct.

16 **Q.** What are some of the devices that a cloud gaming service
17 can stream to?

18 **A.** Ideally any device that is capable of playing back video
19 should be eligible for enjoying cloud gaming. So any type of
20 connected screen, be it a TV, a mobile device, a tablet, PC.

21 **Q.** A gaming console?

22 **A.** Certainly could, yes.

23 **Q.** I have a few questions about how the cloud gaming servers
24 work.

25 Where -- it may be helpful to explain sort of how the data

1 gets from a cloud gaming server to a device.

2 **A.** So in -- in a typical cloud gaming architecture, the one
3 Stadia implemented, the game is rendered -- the image is
4 rendered on a server in a data center ideally close to end
5 users, and it's streamed.

6 So we take a rendered sequence of images, package them to
7 carry them over a network, and stream them to a consumer's
8 device, and a consumer only needs a decent internet connection
9 and a screen.

10 And the consumer's interactions might be mouse and
11 keyboard or a game pad, anything like that, would go in the
12 opposite direction back to the server to enable the
13 interactivity and update the imagery that's streaming down.

14 **Q.** You said "ideally close." Why ideally close?

15 **A.** So in any type of network, the further away the data
16 center is from a consumer, the more latency will exist in the
17 connection. Gaming, especially at the highest ends of gaming,
18 is a very latency-sensitive form of entertainment. So the
19 lower the latency, the better the experience.

20 **Q.** Okay. So a closer server means lower latency?

21 **A.** Correct.

22 **Q.** Could a user in the United States use a cloud game
23 streaming server that's based, for example, in Europe?

24 **A.** It's a far from ideal experience. I think technically
25 that can work. And, you know, economically somebody entering

1 the space might only want to have a single data center for the
2 whole planet, but the corresponding experience that consumers
3 would have would really be degraded relative to what they could
4 have if -- if the servers were much closer.

5 Q. And that's for the latency reason you just described?

6 A. That's correct.

7 Q. Let's go back to Stadia. When was Stadia launched?

8 A. So there was a -- what we thought of as our public beta
9 was towards the end of 2018, what we called Project Stream. We
10 announced the broader version for Stadia at the Game Developer
11 Conference in March of 2019, and Stadia was introduced as an
12 actual service in November of 2019.

13 Q. And is Stadia still operating?

14 A. No.

15 Q. When did Stadia shut down?

16 A. January 18th, 2023.

17 Q. Were there any significant factors that led to --
18 contributed to Stadia's lack of success?

19 A. I believe so. In my opinion, the primary factor was our
20 ability to have sufficient content breadth. So the number of
21 games that were on the platform as well as depth. The
22 Blockbusters.

23 You know, at a certain time I think that was part and
24 parcel to us being able to have a healthy two-sided market that
25 would have enough players interested and enough publishers

1 interested to have a long-term viable product.

2 **Q.** Okay. We'll come back to content, but I want to ask a
3 couple questions about sort of the technical makeup of Stadia.

4 Was the -- from a technical standpoint, was the cloud
5 gaming service that Google created, Stadia, was that a success?

6 **A.** We believe so, yes.

7 **Q.** Why?

8 **A.** The -- I think there's different ways to answer that. So
9 in my opinion, one factor is all of the qualitative testing
10 that we did. So bringing -- bringing players into lab
11 environments and doing comparative testing of the experience
12 that they would have over, you know, something streamed from a
13 data center over a network versus the experience they would
14 have on a console or PC.

15 In establishing the -- the place where the experience was
16 console comparable, where they couldn't tell the difference,
17 what we would describe internally as the Pepsi challenge, in
18 most cases we succeeded with that.

19 As well, I think, there was lots of feedback from players
20 and publishers that we'd done a very good job on the tech, and
21 it was not a limiting factor in the experience.

22 **Q.** How would you rate the technical capabilities of Stadia as
23 a cloud gaming service compared to other cloud gaming services
24 before Stadia shut down?

25 **A.** To my knowledge, we had the best technology in the market.

1 Q. Were there any metrics that you used to compare Stadia to
2 other cloud game streaming services?

3 A. Certainly. So we use a measure known as mean opinion
4 score, and it's effectively a qualitative feedback measure of a
5 player's experience during a game.

6 Any Stadia consumer was able to provide that after a game
7 session. That's also how we did our user experience research
8 internally.

9 And we had explored sort of competitive alternatives, just
10 a baseline where we stood. With that measure, Stadia tended to
11 be superior.

12 As well, we had performance capabilities that weren't
13 common to -- or, to my knowledge, don't exist in the market
14 otherwise. So, for example, 4K resolution, 10-bit color depth,
15 things that cloud gaming hadn't done before.

16 Q. What about something like video quality?

17 A. We believe the approach that we took to encoding and
18 delivering video was superior to alternatives that existed in
19 the market.

20 Q. Was the latency of Stadia compared to other cloud game
21 streaming services?

22 A. So, to the best of my knowledge, we on average have
23 superior latency, which means we'd have the lowest numbers.
24 That can depend on where you're taking the measurement. So if
25 you're measuring right next-door to a data center, you have a

1 very low signal; but in terms of the number of data centers we
2 had in the markets that we were operating in, I believe on
3 average we delivered the best latency.

4 Q. Okay. Are you familiar with the term "technology stack"
5 in relation to Stadia?

6 A. I believe so.

7 Q. Can you explain what that is?

8 A. So there's a layering from the underlying hardware that
9 may exist in a data center to operating systems and application
10 programming interface is sort of the middle parts to ultimately
11 what the games are themselves and what the games are running
12 on. So the technology stack encompasses that totality from
13 hardware to game.

14 Q. Okay. I want to ask a few questions about Stadia's
15 technology stack.

16 Are you familiar with something called Linux?

17 A. Yes.

18 Q. What is Linux?

19 A. Linux is an operating system. It's -- at the lower layers
20 in the stack it is an open-source royalty-free operating
21 system.

22 Q. Did Stadia use Linux?

23 A. Yes, we did.

24 Q. Is Microsoft Windows an alternative to Linux?

25 A. Yes, it is.

1 Q. And I think we're talking about the data centers where
2 Stadia was located. Why did -- why didn't Stadia use Windows?

3 A. We had prototyped on Windows early on, and we had done
4 both technical and commercial evaluations of the operating
5 system options.

6 So the mission we had established at the very beginning
7 was to enable revolutionary gaming experiences on any connected
8 screen. For the experiences themselves to be revolutionary,
9 what that meant to us is we were enabling game developers to
10 create experiences we hadn't seen before in data centers.

11 And we saw Windows as limiting our ability to innovate in
12 that regard because we didn't have control over the operating
13 system and how game developers might ultimately express what
14 they were trying to do inside of the data center, as well as
15 the licensing fees were commercially untenable.

16 Q. So you said you didn't have control over the --

17 A. Yeah.

18 Q. -- operating system. What were the -- what would be the
19 downsides of not having control of the operating system?

20 A. Our ability to get into the depths of the networking
21 stacks of what happens when a video frame is rendered and
22 delivered to the networking stacks, what would happen in the
23 multiplayer context when different game instances are trying to
24 talk to one another.

25 So all of those things are areas that we innovated both

1 above and beneath the operating system layer because we had
2 access to the open source, and that very much was a principal
3 choice we made in selecting Linux early on.

4 **Q.** What about the price difference? Is there any -- were
5 there any downsides from a licensing perspective in choosing
6 Windows?

7 **A.** If I remember correctly, the Windows licensing cost would
8 have two X'd, so over doubled -- I'm sorry, it would have over
9 doubled our total cost of operating on -- on a hardware that
10 was equivalent to the 8th generation of consoles. So like a
11 PlayStation 4 or an Xbox Series X.

12 And the Windows licenses on a per-CPU basis, what changed
13 in the industry between the 8th generation of consoles and the
14 current generation, like a PlayStation 5, is double the number
15 of CPU. So that would have, again, doubled what was already --
16 what we saw as an untenable cost.

17 **Q.** Thank you.

18 What is Vulkan?

19 **A.** Vulkan is a graphics application programming interface.
20 So it sort of separates an underlying graphic accelerator or a
21 GPU from what a game or graphics-intensive application would
22 want to talk to, enabling a standard for the game to stand
23 upon.

24 **Q.** And this is a Vulkan with a K?

25 **A.** That's correct.

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1 Q. Did Stadia use Vulkan?

2 A. Yes, we did.

3 Q. And why did Stadia use Vulkan?

4 A. So it at the time of selection, and if I remember
5 correctly it was somewhere in the 2015 to 2016 timeframe, the
6 only options in the industry were Microsoft's Direct xAPI,
7 which would have obligated us to be in the Microsoft ecosystem,
8 including with Windows, as I understood it, or what was then
9 known as Open GL, neither of which were going to work for what
10 we needed.

11 And in particular Open GL, which was an open standard, was
12 really more for mobile and just didn't have the performance
13 that high-end games required.

14 Vulkan was a new standard coming out of the same
15 committees that drove the standards for Open GL, and it -- the
16 intention was to enable an explicit API, so enabled very
17 high-performance interaction between something like the game
18 and the underlying GPU hardware. We believe that was the most
19 effective path to enable -- to enable AAA gaming.

20 Q. Okay. I'd like to go back to content.

21 Are you familiar with the term "AAA game"?

22 A. I believe so, yes.

23 Q. What is that? What is a AAA game?

24 A. So the way I understand the term, the way we would use it
25 in Stadia, is referring to the largest games, which typically

1 have the highest production value and tend to be the
2 blockbusters in the industry at that point in time.

3 **Q.** Did Stadia want AAA claims on its cloud gaming service?

4 **A.** Very much so.

5 **Q.** Why?

6 **A.** All of our consumer research helped us understand that for
7 players to be interested in a new games platform, there needed
8 to be AAA games recent, you know, sort of the Blockbusters, if
9 you will, of the current time. That was as important to them
10 as a breadth of games to choose from.

11 **Q.** Is it just AAA games that Stadia needed?

12 **A.** I think of AAA games as providing the depth that players
13 expressed interest in and as well having breadth via what we
14 might refer to as AA or indie, that being independent games,
15 which would canvas more game developers and introduce more sort
16 of unique and bespoke content.

17 **Q.** Did Google do anything to try and bring AAA games to
18 Stadia?

19 **A.** Yes. The -- we spent substantial energy creating a games
20 platform that the leading game developers could build for us.
21 So to bring their AAA content to the platform, providing them
22 the tools and resources they would need to accomplish that
23 technically.

24 As well, we knew commercial incentives would be required
25 for them to participate early on until we reached a certain

1 level of player participation for that to be in their best
2 interest.

3 **Q.** Are you familiar with something called SG&E?

4 **A.** I believe the acronym is referring to Stadia Games and
5 Entertainment.

6 **Q.** What was Stadia Games and Entertainment?

7 **A.** So at the same time we announced Stadia in March of 2019,
8 we introduced Stadia Games and Entertainment, which was a
9 first-party studio intending to build games that were unique to
10 Stadia very much intending to show the way to a cloud-native
11 gaming future.

12 **Q.** Why did Google set up a first-party game development
13 studio?

14 **A.** So I don't know that I have all the answers to that
15 question. From my perspective, the -- the opportunity for game
16 development to move towards cloud-native experiences, to,
17 again, take advantage of data centers and deliver experiences
18 that have had never been delivered before. I believe we
19 realized we would need to be building some of those
20 forward-looking experiences ourselves because it was unlikely
21 we were going to incentivize third parties to do it on their
22 own. So one way we would speak about that is being a
23 lighthouse for the industry in the direction of innovation we
24 could take.

25 As well, we thought it was important to have reasons for

1 players to come to Stadia, and games they couldn't get anywhere
2 else would certainly be a reason.

3 Q. Okay. When you say "games they couldn't get anywhere
4 else," are you talking about exclusive games?

5 A. Yes.

6 Q. What's the value of exclusive AAA content from the
7 perspective of a cloud gaming service like Stadia?

8 A. If there was interesting content that a consumer, you
9 know, wants to enjoy their decision of where to enjoy that --
10 right? -- is effectively guided by where it's available. So if
11 there's an amazing gaming experience on a given games platform,
12 that's likely to draw consumer interest who otherwise might not
13 be interested.

14 Q. What happened to Stadia Games and Entertainment?

15 A. As I understand it, we found ourselves at a difficult
16 place where the industry was consolidating. That was driving
17 costs up, and the total time that we imagined it would take to
18 bring AAA games to market, which historically has been upwards
19 of five years for a given game, was going to be far more
20 expensive in the environment that we found ourselves in than we
21 had originally planned for.

22 Q. When did Google shut down Stadia Games?

23 A. If I remember correctly, it was early in 2021.

24 Q. And did the shutdown of SG&E occur before the shutdown of
25 Stadia?

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1 **A.** Yes.

2 **Q.** Outside of SG&E, I think we already talked about some of
3 the ways that Google brought content to the service.

4 You mentioned something called porting I think. What is
5 porting?

6 **A.** Yeah. So from a game development perspective, a studio
7 may be building for a specific console or building a game for a
8 PC. They may -- they may think of that as the primary SKU that
9 they're building for, and any other platforms that they want to
10 release that game on would be a port. So they'd take the work
11 that they've done for the primary target and port it to other
12 platforms.

13 In many cases with all of the third parties Stadia was
14 dealing with, as a new service in the market, we were a porting
15 target for those studios and we needed to make it incredibly
16 efficient for them to do that.

17 **Q.** And did Google offer financial incentives for developers
18 to port their games to Stadia?

19 **A.** Yes.

20 **Q.** So mindful in trying to keep the court open, could you
21 turn to PX8003 that's in your binder.

22 **A.** 8003?

23 (Witness examines document.) Okay.

24 **MR. AKLEMAN:** I move to admit PX8003.

25 **THE COURT:** Admitted.

ZIMRING - DIRECT / AKLEMAN

(Trial Exhibit 8003 received in evidence.)

BY MR. AKLEMAN:

Q. Can you look in the second paragraph? It's the fourth line from the bottom, there's a number there.

A. Yes.

Q. Is that the amount that Google invested to bring the games to the platform -- to the Stadia platform?

A. To the best of my knowledge, I believe this is accurate.

Q. Okay. We can set that aside for a minute. Did the size of Stadia subscriber base affect the availability of games on the service?

A. Yes.

Q. Did Stadia have any overall targets for subscribers?

A. So we certainly had an early concept based on historical precedent of what we thought of as critical mass. And so at what point would a games publisher naturally develop a title for a platform independent of any incentives or deals or so forth just because of how many subscribers, you know, existed on that platform. So that was a target we had set early on as a place we wanted to get to.

Q. Okay. And once Stadia reached that critical mass, developers would bring their games to Stadia?

A. That was the belief.

Q. Again, let's -- without saying the number in open court, could you turn back to your declaration? This is PX8003.

ZIMRING - CROSS / PASTAN

1 And can you go to paragraph 20? And do you see the first
2 line of paragraph 20? Does that -- do you see that number
3 there?

4 **A.** Yes.

5 **Q.** Is that the number that Google thought was the critical
6 mass for Stadia?

7 **A.** I believe so, yes.

8 **Q.** Okay. We can set that back aside.

9 Based on your experience in building out Stadia, how
10 difficult is it to build a cloud gaming service independent of
11 the Microsoft ecosystem?

12 **A.** You know, from my perspective, Google put substantial
13 effort into all of the underlying technology, all of the data
14 centers that we built out to deliver the lowest possible
15 latency and all of the commercial incentives that we thought
16 were necessary to sort of bootstrap the ecosystem.

17 I guess my short answer is it's extremely difficult
18 outside of how the ecosystem is today for something new like
19 Stadia to be able to find a footing.

20 **MR. AKLEMAN:** Thank you. No more questions.

21 **THE COURT:** Any cross-examination?

22 **MS. PASTAN:** Anastasia Pastan for Microsoft.

23 **CROSS-EXAMINATION**

24 **BY MS. WILKINSON:**

25 **Q.** Good afternoon, Mr. Zimring. I just have a few questions.

ZIMRING - CROSS / PASTAN

1 You testified on direct that Google launched a cloud
2 gaming service in 2019 called Stadia; correct?

3 **A.** Yes.

4 **Q.** Stadia had several competitors when it launched; right?

5 **A.** When you say "competitors," I'm not sure what you're
6 describing.

7 **Q.** Did Stadia have several competitors when it launched?

8 **A.** So I think Stadia's -- I would say that our perspective
9 was that the existing console and PC gaming participants were
10 what represented who we were competing with.

11 **Q.** So Stadia competed with consoles including Xbox?

12 **A.** Yes.

13 **Q.** And Stadia competed with PC distribution platforms?

14 **A.** Yes.

15 **Q.** Such as Steam and Epic?

16 **A.** I think that's fair to say.

17 **Q.** And Stadia also had cloud gaming competitors; is that
18 right?

19 **A.** I don't remember the state of the market at the time we
20 launched, but I don't believe there were cloud gaming --
21 outside of Sony's capabilities, I don't know that the other
22 players that currently exist in the market were there at that
23 time in 2019.

24 **Q.** During Stadia's existence, maybe not at launch but at some
25 point during the existence, Stadia faced competition from cloud

ZIMRING - CROSS / PASTAN

1 gaming services?

2 A. Yes.

3 Q. One of them would have been Nvidia's GeForce NOW?

4 A. That's correct.

5 Q. Another one might have been Xbox's Cloud Gaming service?

6 A. Uh-huh, yes.

7 Q. A few moments ago you testified about how Stadia has since
8 shut down; correct?

9 A. Yes.

10 Q. And you discussed some the reasons that Stadia shut down;
11 right?

12 A. Yes.

13 Q. And one of the things you told the Court was that Stadia
14 very much wanted AAA content; is that right?

15 A. That's correct.

16 Q. And, in fact, Stadia was able to get some AAA games onto
17 its service; is that right?

18 A. That is correct.

19 Q. You don't think Stadia was able to get enough AAA content
20 onto its service?

21 A. I believe with more content we would have seen more
22 success.

23 Q. Google talked to you, Activision, at one point to try to
24 get its content onto Stadia; is that right?

25 A. Yes.

ZIMRING - CROSS / PASTAN

1 Q. You are aware that there is no cloud gaming service that
2 has Activision content today?

3 A. Honestly, I don't know the state of Activision's presence
4 in other cloud gaming systems.

5 Q. Do you know of any cloud gaming service that has
6 Activision content today?

7 A. Nothing comes to mind.

8 Q. And earlier you agreed that Xbox Cloud Gaming was one of
9 Stadia's competitors; right?

10 A. Yes.

11 Q. And Xbox Cloud Gaming doesn't have Activision games, does
12 it?

13 A. I -- honestly I don't know the full catalog of what Xbox
14 has.

15 Q. So you have no reason to believe Xbox Cloud Gaming has
16 Activision content on it today?

17 A. I don't have a reason to believe one way or the other.

18 Q. And, again, you identified GeForce NOW as one of Stadia's
19 competitors; is that right?

20 A. That is correct.

21 Q. And you have no way of knowing whether GeForce NOW has
22 Activision content on it today?

23 A. Correct.

24 Q. You can't name any cloud gaming service that has
25 Activision content?

ZIMRING - CROSS / PASTAN

1 **A.** No. I'd be -- it would be difficult for me to recite what
2 the different publishers and titles are across the market at
3 this time.

4 **Q.** Despite over a decade of time in the cloud gaming
5 industry, you do not keep up to date on the status of cloud
6 gaming services?

7 **A.** All I can tell you is that I don't know definitively which
8 titles are on which services at this time.

9 **Q.** Okay. You testified about a number of places that gamers
10 could play on Stadia?

11 **A.** Yes.

12 **Q.** Was Stadia playable on Xbox?

13 **A.** No.

14 **Q.** Not even through Xbox's browser?

15 **A.** Actually, I don't know honestly.

16 **Q.** Do you know whether Stadia was playable on PlayStation?

17 **A.** So if PlayStation has a Chromium-based browser or Xbox,
18 Stadia may have been playable. I think perhaps the more
19 appropriate thing would be for me to say that I'm not aware of
20 us qualifying those as supportive platforms.

21 (Pause in proceedings.)

22 **BY MS. PASTAN:**

23 **Q.** Although Stadia is out of the cloud gaming business now,
24 are you aware that Microsoft has entered into contracts to make
25 Activision games available to cloud providers if this deal goes

ZIMRING - CROSS / PASTAN

1 through?

2 **A.** I've heard some news about that. I don't know any of the
3 details.

4 **Q.** You've heard news that they've reached a deal with Nvidia
5 to make Activision content available on GeForce NOW?

6 **A.** I believe so.

7 **Q.** Have you heard news that they've made a deal to make
8 Activision content available on Boosteroid?

9 **A.** I believe so.

10 **Q.** And on Ubitus?

11 **A.** I believe so.

12 **Q.** And on EE cloud gaming service?

13 **A.** I'm not aware of that service.

14 **Q.** And on Nware cloud gaming service?

15 **A.** Also I'm not aware of that.

16 **Q.** But you're aware of the first several that I listed?

17 **A.** Yes.

18 **Q.** And you're not aware of any services -- of any cloud
19 gaming services that have Activision content today?

20 **A.** That's correct.

21 **Q.** It's fair to say that if the deal goes through, Activision
22 content would be available on more cloud gaming services than
23 you're aware of today?

24 **MR. AKLEMAN:** Objection. Foundation.

25 **THE COURT:** I'll sustain it. We get it.

PROCEEDINGS

1 **MS. PASTAN:** One moment, Your Honor.

2 (Pause in proceedings.)

3 **MS. PASTAN:** I have nothing else.

4 **THE COURT:** Great. Anything further?

5 **MR. AKLEMAN:** Just one question.

6 **THE COURT:** Okay? It better be a good one.

7 **MR. AKLEMAN:** Maybe I shouldn't have promised that.

8 **THE COURT:** No pressure. No pressure.

9 **REDIRECT EXAMINATION**

10 **BY MR. AKLEMAN:**

11 **Q.** Ms. Pastan asked you a few questions about who Stadia
12 competed with when they launched.

13 At the time that Stadia launched, were there any other --
14 were any of those other cloud gaming services that she
15 described operating?

16 **A.** I don't believe so.

17 **MR. AKLEMAN:** Okay. Thank you. I have no more
18 questions.

19 **THE COURT:** Perfect. You are excused. Happy Friday.

20 (Witness excused.)

21 **THE COURT:** All right. So, as you know, that
22 concludes the testimony for today. We are not going to go on
23 Monday.

24 Let me tell you a little bit about the schedule so you can
25 plan. So we have Tuesday, Wednesday, Thursday. You went a bit

PROCEEDINGS

1 over today. So you'll need to use the weekend and Monday to
2 tighten your remaining witnesses.

3 What I would like to do is when we finish up on Thursday,
4 then have closing arguments. I do think that will be very
5 helpful, but I would want -- I will want the final Proposed
6 Findings of Fact and Conclusions of Law by 5:00 p.m. on Friday
7 the 30th, and I'm doing that to save everybody's holiday
8 weekend except maybe mine, but everybody else's. All right?
9 So 5 p.m.

10 So start now. I mean, you've already started. It's an
11 ongoing process. You know what you anticipate the evidence to
12 be so have that, but I will want closing arguments on Thursday.
13 That's the plan.

14 Yes.

15 **MR. WEINGARTEN:** Your Honor, James Weingarten.

16 Do you have any plan for how long you would like closings
17 to be?

18 **THE COURT:** I'm not going to limit you, but I'm going
19 to trust you to know your audience.

20 **MR. WEINGARTEN:** Yes, ma'am. Thank you, Your Honor.

21 (Laughter)

22 **THE COURT:** I expect it to be interactive so you
23 should prepare it, but I expect it to be interactive.

24 The other thing is the parties have been -- I understand
25 it's an ongoing process -- submitting like modified

PROCEEDINGS

1 administrative motions to seal, it's all coming in, so what I
2 need is an omnibus administrative motion to seal that covers
3 everything, trial exhibits, that we've done up to now. We've
4 now ruled on everything so I think you can do it so that we
5 have one motion that we can grant and it will be all accurate.

6 And to the extent you can include stuff going forward
7 because you have a little bit more time now to know for
8 Tuesday, Wednesday, Thursday, that would be great. But at
9 least that covers up to now.

10 Did I cover everything?

11 Okay. I really appreciate everyone's courtesy in the
12 presentation, and the advocacy has been outstanding. And I
13 wish you all a good weekend, and I will see you Tuesday again
14 at 8:15 in closed session and 8:30 to begin the evidence.
15 Thank you.

16 (Proceedings adjourned at 3:30 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, June 23, 2023

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter